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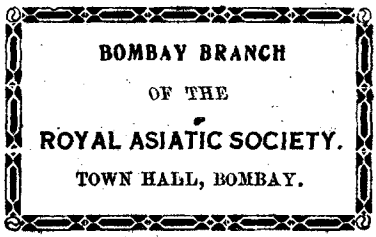

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PRECEDENTS OF PLEADINGS.

PRECEDENTS

OF

PLEADINGS

IN PERSONAL ACTIONS IN

The Superior Courts of Common Law.

WITH NOTES,

AND

AN APPENDIX OF RECENT STATUTES AND GENERAL RULES RELATING TO PLEADING.

78798

BY

EDWARD BULLEN, ESQ.,
OF THE MIDDLE TEMPLE,

AND

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"Formulas agendi diversas in unoquoque genere colligito. Nam et practicæ hoc interest; et certè pandunt illæ oracula et occulta legum. Sunt enim non pauca quæ latent in legibus, at in formulis agendi meliùs et fusiùs perspiciuntur."—BACON, *Aph. de Leg.*, lxxviii.

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TO THE SECOND EDITION.

THE demand for a new edition of this Work gives the Authors an opportunity of presenting it to the profession with many corrections and additions. The additions have been made solely with the object of rendering the Work more complete, without any alteration of the original plan. The Precedents are more numerous and are more systematically arranged. Many of the principal Notes have been re-written; some new ones have been added; and the whole Work has been carefully revised. The alterations effected by the C. L. P. Act, 1860, since the publication of the former edition, have been introduced; and so much of that Statute as relates to the subject has been added to the Appendix. Throughout the Appendix references have been given to the pages of the Work in which the various enactments and rules have been cited or commented on; and thus such mention of them as is contained in the Notes may be readily referred to. A fuller Table of Contents has been prefixed to the Work, and the Index has been recast and considerably enlarged. The References to the Cases and Statutes have been carefully brought down to a recent date.

Middle Temple, December, 1862.

PREFACE

TO THE FIRST EDITION.

THIS Work was undertaken in consequence of the want, experienced in actual practice and expressed generally by the profession, of a collection of Precedents settled in conformity with the recent alterations in the System of Pleading. It was begun only when the lapse of time seemed to render it hopeless that the task would be performed by other hands; and it is now presented to the profession with sincere diffidence, but with a hope that it may serve in some degree to supply the existing want.

The system of pleading has recently passed through a period of transition, in which it has undergone most extensive and important amendments. These, for the most part, have been the result of the labours of Her Majesty's Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, and have been framed upon the recommendations contained in their Reports. They have been effected at intervals, by the Common Law Procedure Acts of 1852 and 1854, and by the subsidiary Rules of Court made by the Judges. The Commissioners have now closed their labours and issued their final Report, in which they appear to consider that very few points affecting Pleading remain in want of amendment. The period of transition may therefore be considered to have passed; and this branch of the law is now left in a state in which it will probably rest for some years to come.

The effect of the recent alterations in pleading has not been to destroy the system or to change its essential principles. The object proposed by the learned Commissioners and effected by the late statutes and rules has been only to prefer substance to form, and to prevent unnecessary technicality from working injustice. Although particular forms of expression are no longer indispensable, it is obviously most important that pleadings should as far as possible be uniform, and that precedents or forms which have acquired an ascertained and understood meaning should be used in preference to new modes of expression, the meaning of which must necessarily contain the elements of uncertainty and doubt. Without the use of precedents it is almost impossible, particularly in pleadings of a complicated nature, for any one but an accurate lawyer and experienced draftsman to avoid overlooking some points of a case absolutely essential to the maintenance of the right or defence. This was never more apparent than it has been in some of the specimens of pleadings which have been met with since the recent changes in the law, drawn by unpractised hands without precedent or guide.*

* The very learned editors of Smith's Leading Cases (Mr. Justice Willes and Mr. Justice Keating, the former of whom was a member of the Royal Commission), adverting to the effect produced on the art of pleading by the relaxation of the former rules of criticism, and by the powers of amendment given by the Common Law Procedure Act, 1852, make the following valuable remarks: "It must, however, be remembered that the accurate statement of such of the facts and circumstances of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant on the other to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice upon merely formal grounds may be averted by the provisions already referred to, no legislative enactment can in all cases prevent the expense and delay which result from the necessity for amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care in the first instance to make the pleadings true and perspicuous, adopting the known and understood formulæ used for the sake of brevity in cases of frequent occurrence, and, where there is no such formula, stating the material facts as they can be proved to exist in intelligible language."—1 Smith's Leading Cases, 4th ed. 103.

A necessary consequence of the extensive changes in the law of pleading is, that the valuable and elaborate works previously existing have been rendered comparatively useless, except to those persons who possess an intimate acquaintance as well with the former practice as with the recent changes. The object of the Authors of this Work has been to supply a collection of precedents, with instructions for their use, adapted to the law and practice of pleading in its present state.

In settling the Precedents they have attempted to follow as closely as possible the examples given in the Schedule to the Common Law Procedure Act of 1852. They have endeavoured to render the collection sufficiently complete to meet the cases of most frequent occurrence in practice.

Numerous references have also been given to precedents in reported cases, from which it is hoped the practitioner may derive assistance in drawing pleadings in cases of less common occurrence. Care should, however, be taken in using the forms found in the Reports to settle them as nearly as possible in accordance with the forms contained in the Schedule to the Common Law Procedure Act. It is also hoped that these references to reported forms will be found useful as a guide to the most recent or to the leading cases on the particular points of law to which they relate; and it will be seen that some of the references have been introduced more especially with this view.

The Precedents have been arranged in conformity with the plan adopted in the Common Law Procedure Act of 1852, where the division of causes of action into the two, so to speak, natural divisions of actions on contracts and actions for wrongs independent of contract (irrespective of the technical distinction between forms of action) received an authoritative recognition. This division has been found very convenient in the compilation of the Work; and it is hoped that it will be found equally convenient in its use.

The Notes contain references to the statutes, rules of court, and principal decisions relating to the pleadings to which they are appended, with such practical observations on the object and effect of the pleadings as appeared necessary for their more convenient use.

The Authors have endeavoured, by a careful selection of the matter, to keep the Work within moderate limits, in order to present it to the profession in a form which, it is hoped, will prove most generally useful.

Middle Temple, May, 1860.

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5. Line 2 of note, add :—*Bellingham* v. *Carr*, 1 E. B. & S. 332; *Stubs* v. *Stubs*, 31 L. J. Ex. 510; and see *post*, p. 405.
6. Line 2 of note, add :—*Carr* v. *Cooper*, 1 E. B. & S. 230.
21. Add, with reference to Joint Stock Companies :—By "The Companies Act, 1862," 25 & 26 Vict. c. 89, s. 205, the Acts specified in the Schedule, comprising amongst others the 7 & 8 Vict. c. 110; 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14, are repealed; but by s. 206, no repeal thereby enacted shall affect anything duly done under any Acts thereby repealed; or the incorporation of any company registered under any Act thereby repealed; or any right or privilege acquired, or liability incurred, under any Act thereby repealed. By the same Act, the laws relating to the incorporation, regulation, and winding-up of trading companies and other associations are consolidated and amended; but the enactments of the Joint Stock Companies Acts, 1856, 1857, repealed as above-mentioned, are re-enacted without material alteration.
21. Add, with reference to Joint Stock Banking Companies :—The Acts 20 & 21 Vict. c. 49; and 21 & 22 Vict. c. 91, relating to Joint Stock Banking Companies are repealed by "The Companies Act, 1862," subject to the qualifications mentioned above with reference to Joint Stock Companies.
24. Note (*b*), add :—Industrial and Provident Societies are incorporated by name by the 25 & 26 Vict. c. 87, s. 5.
42. Line 4 from bottom, add to *Atkinson* v. *Denby* :—affirmed on appeal, 31 L. J. Ex. 362.
104. Line 19 of note, add :—As to contracts with a carrier made without the realm to carry to a place within the realm, see *Branly* v. *South Eastern Ry. Co.*, 31 L. J. C. P. 286.
106. Note (*a*), add to *Behrens* v. *Great Northern Ry. Co.* :—affirmed on appeal, 31 L. J. Ex. 299.
108. After line 22, add :—*A like count: Van Toll* v. *South-Eastern Ry. Co.*, 31 L. J. C. P. 241.

Count for not delivering goods left at a station within a reasonable time after request: Stallard v. *Great Western Ry. Co.*, 31 L. J. Q. B. 121.

110. Line 4 of note, add :—The indorsee of a bill of lading who has indorsed it away before the arrival of the cargo does not remain liable for the freight under the statute. (*Smurthwaite* v. *Wilkins*, 31 L. J. C. P. 214.)
113. Line 18 of note, add :—*Blake* v. *Great Western Ry. Co.*, 31 L. J. Ex. 346.
113. Note (*a*), add to *Cahill* v. *London and North-Western Ry. Co.* :—affirmed in error, 31 L. J. C. P. 271.
120. Note (*a*), add :—The Act for the Registration, Incorporation, and Regulation of Joint Stock Companies is repealed by the Companies

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Act, 1862, subject to the qualifications contained in s. 206 (see the correction to p. 21, *supra*).

121. Note (*a*), add :—The Companies Acts, 1856, 1857, are repealed by the Companies Act, 1862 (see the correction to p. 21, *supra*), which Act, by s. 176, applies to companies formed and registered under the Joint Stock Companies Acts, 1856, 1857, as if registered under it. And by s. 70, it is enacted that "In any action or suit brought by the company against any member to recover any call or other moneys due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due, whereby an action or suit hath accrued to the company."

122. Note (*a*), add :—see *Wyatt* v. *Metropolitan Board of Works*, 31 L. J. C. P. 217.

135. Line 18 of note (*a*), add :—The statutes relating to these societies are all repealed by "The Industrial and Provident Societies Act, 1862," 25 & 26 Vict. c. 87, which, by s. 5, incorporates such societies by name upon registration.

138. Line 4 of note, add :—*Bradshaw* v. *Beard*, 31 L. J. C. P. 273.

147, and at p. 404, add to *Garrard* v. *Giubelei* :—affirmed in error, 31 L. J. C. P. 270.

148. Line 14 of note :—Instead of "spent in" read "in discharge of debts incurred for."

154. Note (*b*) will be found on the preceding page.

156. Line 16 from bottom, add :—*Paterson* v. *Harris*, 31 L. J. Q. B. 277.

223. Note (*a*), add :—The Joint Stock Companies Act, 1856, was repealed by "The Companies Act, 1862," and Joint Stock Companies are now regulated by the latter Act (see the correction to p. 21, *supra*). The ss. 20, 66, cited in the note, are not re-enacted in the Companies Acts, 1862; but the provision in s. 20 is contained amongst the regulations for management of a company in the first schedule, table A (8).

230. Line 11 of note (*b*), add :—Upon a sale of goods bearing a trade-mark or description, the sale is now to be deemed to have been made with a warranty of such trade-mark or description, unless the contrary is expressed in writing; see "The Merchandise Marks Act, 1862," 25 & 26 Vict. c. 89, ss. 19, 20.

234. Line 2 of note (*a*), add :—*Bigge* v. *Parkinson*, 31 L. J. Ex. 301.

258. Note (*a*), add :—Copyright in works of the Fine Arts is regulated by 25 & 26 Vict. c. 68.

266. Line 13 of note, add :—*Parkins* v. *Scott*, 31 L. J. Ex. 331.

277. Line 6 of note (*a*), add :—*Singleton* v. *Williams*, 31 L. J. Ex. 287.

285. Line 9 from bottom, add :—*Pym* v. *Great Northern Ry. Co.*, 31 L. J. Q. B. 249.

293. Note (*b*), add :—The Act for the better management of Highways in England, 25 & 26 Vict. c. 61, is to be construed as one Act with the 5 & 6 Will. IV. c. 50, except as in the former Act provided; see s. 42.

294. Line 2 from bottom, add :—See *Brockbank* v. *Whitehaven Junction Ry. Co.*, 31 L. J. Ex. 349.

301. Last line of note, add to *Jones* v. *Tapling* :—affirmed in error, 31 L. J. C. P. 342, where see the case of *Renshaw* v. *Bean*, questioned.

302. Note, add to *Webb* v. *Bird* :—affirmed in error, 31 L. J. C. P. 335.

312. Line 3 from bottom, add :—But see *Kenrick* v. *Horder*, 7 E. & B. 628.

315. Add at end of note :—A master is liable for an injury to his servant caused by dangerous machinery, which the master was bound to

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fence, and which has become unfenced during the employment by the negligence of the master, although the servant knew that it was unfenced. (*Holmes* v. *Clarke*, 30 L. J. Ex. 135; 31 Ib. 356.)

329, and also at pp. 595, 642, after *Bamford* v. *Turnley*, add:—31 L. J. Q. B. 286.

352. Note (*d*), add:—By "The Merchandize Marks Act, 1862," 25 & 26 Vict. c. 89, ss. 19, 20, a sale of an article bearing a trade-mark or description, imports a warranty of such trade-mark or description, unless the contrary is expressed in writing.

362. Line 4 from bottom, add:—see *Jones* v. *Jones*, 31 L. J. Ex. 506.

378. Line 13 of note, add:—In an action on a policy of insurance on goods for a total loss, the issue raised by a traverse of the loss is distributable, and if a partial loss is proved, the verdict may be entered for the defendant except as to such partial loss. (*Paterson* v. *Harrison*, 31 L. J. Q. B. 277.)

409. Line 15 of note, add:—*Scott* v. *Lord Seymour*, 31 L. J. Ex. 457.

442. Line 11 of note, add to *Cruger* v. *Dunlop*:—7 H. & N. 525; and at line 12 of note, add to *Oppenheimer* v. *Grieves*:—31 L. J. Ex. 375; 7 H. & N. 533; and to *Walter* v. *Adcock*:—31 L. J. Ex. 380; 7 H. & N. 541; and at line 13 of note, add:—but see *Re Rawlings, coram* Lords Justices, 6th December, 1862; New Reports, 149.

487. Line 2 from bottom, add to *Wake* v. *Harrop*:—affirmed in error, 31 L. J. Ex. 451.

510. Note (*b*) is appended to ILLEGALITY, on the next page.

530. At the commencement of note (*b*), add:—The general issue to a count for a debt on a foreign or colonial judgment is *never indebted*; and the plea of *nul tiel record* is a bad plea. (*Philpott* v. *Adams*, 31 L. J. Ex. 421.)

546. Line 11, for "*testator*," read "*intestate*."

626. Line 13 of note, add:—An innkeeper has a lien for the amount of his guest's bill on the horses of his guest which have been kept at the inn, although occasionally taken out for use. (*Smith* v. *Allen*, 31 L. J. C. P. 306.)

676. After line 4, add:—*Pleas, in an action by one tenant in common against another for the destruction of the property, as to the trespasses in respect of the plaintiff's share, payment into court; and as to the residue*, liberum tenementum, *and a traverse of the plaintiff's property: Cresswell* v. *Hedges*, 31 L. J. Ex. 497.

PRECEDENTS.

CHAPTER I.

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

Ordinary Form of Commencement and Conclusion of a Declaration (C. L. P. Act, 1852, s. 59.) (a)

In the Queen's Bench [*or* Common Pleas *or* Exchequer of Pleas].
The —— day of ——, A.D. ——(b)
(*Venue*) (c). *A. B.* by *C. D.* his attorney [*or* in person, *as the case*

(*a*) *Form of commencement and conclusion.*]—By the C. L. P. Act, 1852, s. 59, every declaration must commence in this form or to the like effect. If it deviates from this form in any material particular, an application may be made to the court or a judge to set it aside as irregular, or to amend it. (See *White* v. *Feltham*, 3 C. B. 658.)

(*b*) *Title and date.*]—By the C. L. P. Act, 1852, s. 54, "Every declaration and other pleading shall be entitled of the proper court, and of the day of the month and the year when the same was pleaded, and shall bear no other time or date." Deviations from this requirement as to title, as where a declaration is entitled on the back only (*Ripling* v. *Watts*, 4 Dowl. 290), or as to date, as by omission of the era "of our Lord" (*Holland* v. *Tealdi*, 8 Dowl. 320), or by delivering a pleading on a day after that on which it bears date (*Newnham* v. *Hanny*, 5 Dowl. 259; *Hodson* v. *Pennell*, 4 M. & W. 373), have been held to be irregularities, and might form a ground for setting aside, or amending the pleading.

Time for declaring.]—The plaintiff may declare immediately after the defendant has appeared. (*Morris* v. *Smith*, 2 C. M. & R. 314.) If the defendant does not appear within the time limited for that purpose by the writ, the plaintiff may proceed, when the writ is specially indorsed, to obtain judgment in default of appearance under the C. L. P. Act, 1852, s. 27, and where the writ is not specially indorsed, to file a declaration under the C. L. P. Act, 1852, s. 28. If the plaintiff does not declare within the term next after the appearance is entered, the defendant may then give him a four days' notice to do so, and sign judgment of *non pros.* against him unless he declares within that period, or such extended period as may be granted on application to the court or a judge. (*Foster* v. *Pryme*, 8 M. & W. 664.) And even though no notice to declare may have been given, if the plaintiff does not declare within one year after the writ of summons is returnable, that is after service of it is effected, he is deemed out of court. (C. L. P. Act, 1852, s. 58; *Barnes* v. *Jackson*, 3 Dowl. 404; *Chaplin* v. *Showler*, 6 D. & L. 227.) It is provided by 2 Will. IV. c. 39, s. 11, that no declaration shall be filed or delivered between the tenth day of August and twenty-fourth day of October. (See further as to the time and mode of declaring, 1 Chit. Pr. 11th ed. 221.)

(*c*) *Venue.*]—By r. 4, T. T. 1853, "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the

may be] sues *E. F.* (*d*) for [*here state the cause of action. If a second or subsequent count is added, commence it thus, without begin-*

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venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading; provided that in cases where local description is now required, such local description shall be given."

The venue, or the county named in the margin of the declaration, is the place where all the facts alleged in the declaration are supposed to have happened. Where the place of the happening of a fact is a material allegation, the venue so stated in the margin supplies that allegation in the absence of any other statement. (*Cook* v. *Swift*, 14 M. & W. 235; *Boydell* v. *Harkness*, 3 C. B. 168.) As to local description and where it is required, see r. 18, T. T. 1853, *post*, "*Trespass to land.*"

The venue is the statement of the county in which the action is to be tried. In respect of the venue actions are either *local* or *transitory*. In the former the venue must be laid truly in the county in which the cause of action arose; in the latter it may be laid in any county at the option of the plaintiff, subject to an application by the defendant to change the venue. As a general rule, actions for wrongs in respect of real property are local, and other actions are transitory. In actions relating to particular subjects, the venue is sometimes made local by statute where it otherwise would not be so. In using the following precedents it may be assumed that the venue is transitory unless it be otherwise stated. Any peculiar rules relating to the venue will be mentioned under the titles to which they apply.

The venue consists merely of the name of the county for which the commission of nisi prius issues, and in which the action is to be tried, as Middlesex, Yorkshire, London, Bristol, etc. By an order in council dated 24th June, 1835, the county of Lancashire was divided for the purposes of the Assizes into "Lancashire Northern Division" and "Lancashire Southern Division," and the venue must be stated accordingly. (*Thompson* v. *Hornby*, 9 Q. B. 978.) If the division of the county is not specified, the cause will be tried at Lancaster. The county of Warwick was also divided into "Warwick division" and "Coventry division," by order in council dated 1st Feb. 1843, but this order was repealed by 17 & 18 Vict. c. 35, and the venue is now "Warwickshire" alone.

By the C. L. P. Act, 1852, s. 41, "Where two or more causes of action joined in the same suit are local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had."

The omission of the venue would be an irregularity, and is said to be a ground for demurrer. (*Remington* v. *Tayler*, 1 Lutw. 235.) If a wrong venue be stated in a local action, and the error appear on the record, the objection may be taken on demurrer. (*Mayor of Berwick-upon-Tweed* v. *Shanks*, 3 Bing. 459; *Simmons* v. *Lillystone*, 8 Ex. 431). If the error does not appear upon the record, it must be pleaded; for otherwise, as a jury can only inquire of the issues raised, (*Boyes* v. *Hewetson*, 2 Bing. N. C. 575; *Richards* v. *Easto*, 15 M. & W. 244), it could not be a ground of nonsuit. (*Hitchings* v. *Hollingsworth*, 7 M. P. C. C. 228.) The error cannot in any case be taken advantage of after verdict. (16 & 17 Car. II. c. 8, s. 1; *Boyes* v. *Hewetson*, *supra*.) A plea to the venue seems to resemble in its nature a plea to the jurisdiction. (*Barker* v. *Damer*, 1 Salk. 80.)

Change of venue.]—In transitory actions the court has power at common law to change the venue. In local actions no such power exists at common law; but by the statute 3 & 4 Will. IV. c. 42, s. 22, a local action may be tried in another county than that stated in the venue by a judge's order, a suggestion of which is to be entered upon the record. (See Chit.

ning a fresh line:] And also for [*or, if the preceding count be a long one:*] And the plaintiff also sues the defendant for, *or* And for a

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Forms, 9th ed. 131.) In such case the venue is not changed, nor is the statement of it in the margin of the declaration altered; and it is immaterial for this purpose whether the venue is local at common law or is made so by statute. (*Greenhow* v. *Parker*, 31 L. J. Ex. 4.) As to causes of action arising in counties of cities and towns corporate, see 38 Geo. III. c. 52, s. 1; *Ilchin Bridge Co.* v. *Local Board of Southampton*, 27 L. J. Q. B. 128; 8 E. & B. 803 (a); Chit. Forms, 9th ed. 131.

The venue cannot in any case be changed as of course, for by r. 18, H. T. 1853, "No venue shall be changed without a special order of the court or a judge, unless by consent of the parties."

The Committee of the Judges to whom the question was referred, as to the practice to be adopted under this rule, reported in the following terms:

"First, that in their opinion it is more convenient as a general rule, that the application to change the venue by rule or summons may be made before issue joined, provided that this shall not prejudice either party from applying, after issue is joined, to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county.

"Secondly, that a defendant on his affidavit to obtain the rule *nisi* to change venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed; which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed." (*De Rothschild* v. *Shilston*, 22 L. J. Ex. 279; 8 Ex. 503.)

The practice recommended by this report has been hitherto adopted in those cases where, according to the previous practice, the venue could be changed. But it has been said that some Judges do not consider themselves bound by the above resolutions. (See per Willes, J., *Jackson* v. *Kidd*, 29 L. J. C. P. 221; 8 C. B. N. S. 354.)

The affidavit that the cause of action did not arise in the county in which the venue is laid, and that it arose in the county to which it is sought to be changed, and not elsewhere, is called the *common affidavit*, and unless answered as above mentioned, is in general sufficient ground for an application to change the venue before issue (see *De Rothschild* v. *Shilston*, *supra*; *Clulee* v. *Bradley*, 13 C. B. 604; *Smith* v. *O'Brien*, 26 L. J. Ex. 30); but it is not alone sufficient ground for an application after issue (*Begg* v. *Forbes*, 13 C. B. 614); nor after the defendant has undertaken to take short notice of trial (*Clulee* v. *Bradley*, *supra*), or notice of trial for a particular sitting. (*Jackson* v. *Kidd*, 29 L. J. C. P. 221.)

If the common affidavit is answered by the plaintiff, the court or judge will decide upon the facts and balance of convenience. (*Ross* v. *Napier*, 30 L. J. Ex. 2; and see *Durie* v. *Hopwood*, 7 C. B. N. S. 835.)

See a full account of the law relating to venue in the notes to *Mostyn* v. *Fabrigas*, 1 Smith's L. C. 5th ed. 606; 1 Wms. Saund. 74 *n.* (2); 241 *d*, *e*, *f*; and in 1 Chit. Pl. 7th ed. 279.

(*d*) *Parties.*]—The declaration should correspond with the writ: (1) in the names of the parties; (2) in the number of the parties; (3) in the characters in which they sue and are sued. (1 Chit. Pr. 11th ed. 223.) A variance between the declaration and the writ (except in the points hereinafter mentioned) is an irregularity and is ground for an application to set aside the declaration. (*Tory* v. *Stevens*, 6 Dowl. 275; *Kitchen* v. *Brooks*, 5 M. & W. 522.)

Names of the parties.]—The Christian names and surnames of the plain-

second [*or* third, *or as the case may be*] count, the plaintiff sues the

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tiff and the defendant should be stated in full and correctly in the writ, and in the declaration. Titles and names of dignity should be added, as: the Right Honourable ——, Duke of, or Marquis of, or Earl of, or Viscount or Baron ——, or the Right Reverend Father in God —— Lord Bishop of ——, Sir —— ——, Bart. A person having a title by courtesy is frequently designated by his proper name, with the addition "commonly called Lord ——." In the case of a clergyman it is usual, but not necessary, to prefix the term "Reverend" to his proper name, or to add "Clerk," after it. As to misnomer in titles and names of dignity: see *Cautwell* v. *Earl of Stirling*, 8 Bing. 174; *Wells* v. *Lord Suffield*, 4 C. B. 750.

By the 3 & 4 Will. IV. c. 42, s. 12, "In actions on bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in the process or declaration to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full." See *post*, "*Bills*," p. 53 (*a*). A person who executes a deed by a wrong name, should be sued by the name in which he executed it. (See *Williams* v. *Bryant*, 5 M. & W. 447; and see 1 Chit. Pl. 7th ed. 265; *Mayor of Lynne's Case*, 10 Rep. 122 *b*.)

Misnomer.]—A name wrongly spelt, in a manner *idem sonans*, is no material misnomer. (*R.* v. *Shakespeare*, 10 East, 83; *Ahitbol* v. *Benidítto*, 2 Taunt. 401.) If there be a misnomer in the writ it seems the defendant can take no advantage of it. (1 Chit. Pr. 11th ed. 183.) But the misnomer should be corrected in the declaration, by inserting the right names, with a statement that the party misnamed had sued or been sued by the name in the writ. Forms for the declaration in such cases are given *post*, p. 10. The defendant can take no advantage of the alteration. (*Hobson* v. *Wadsworth*, 8 Dowl. 601; *Williams* v. *Bryant*, 5 M. & W. 447.) By the 3 & 4 Wm. IV. c. 42, s. 11, if there be a misnomer in the declaration the defendant may cause the declaration to be amended at the costs of the plaintiff by inserting the right name upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying if the judge shall think fit. This is the only proceeding the defendant can take on the misnomer. (*Lindsay* v. *Wells*, 3 Bing. N. C. 777; *Rust* v. *Kennedy*, 4 M. & W. 586.) And the objection must be taken within the time for pleading. (*Kitchen* v. *Brooks*, 5 M. & W. 522.) A misnomer is no ground of nonsuit at the trial, if the defendant be not deceived. (*Boughton* v. *Frere*, 3 Camp. 29.) And it cannot be objected to after any admission of identity by the defendant. (*Fisher* v. *Magnay*, 1 D. & L. 40.)

Number of the parties.]—All the parties suing or sued must be joined, however numerous (see *Meeke* v. *Orlade*, 1 B. & P. N. R. 289), unless they are incorporated, or authorized by a statute to sue or defend by a name or title, or by a public officer, chairman, secretary, etc. (See forms in such cases, *post*.) As to the proper parties to sue or to be sued, and the consequences of misjoinder and nonjoinder of parties. (See *post*, *Pleas*, "*Abatement*.")

By the C. L. P. Act, 1860, s. 19, it is enacted that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover. Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any

defendant for [*here state in like manner the other cause or causes of*

person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

By the C. L. P. Act, 1852, s. 4, "Every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one." Consequently if a party not in the writ be joined in the declaration it may be set aside as irregular (*Haigh* v. *Conway*, 15 East, 1; *Rogers* v. *Jenkins*, 1 B. & P. 383); nor, in general, can the proceedings be amended. (*Goodchild* v. *Leadham*, 1 Ex. 706; *Baker* v. *Neaver*, 1 Dowl. 616.) So also separate declarations against each of several defendants joined in the same writ would be set aside (*Pepper* v. *Whalley*, 1 Bing. N. C. 71) (except under the Summary Procedure on Bills of Exchange Act, 1855, s. 6). But the plaintiff may declare against one or more of several defendants, provided he does not declare against the others (*Coldwell* v. *Blake*, 3 Dowl. 656); for the declaration may narrow the operation of the writ. (*Davies* v. *Thomson*, 14 M. & W. 161, 165.)

Character in which the parties sue or are sued.]—The rule here is that the declaration must not contradict the writ, but may represent the parties in any character consistent with the writ. (*Ashworth* v. *Ryal*, 1 B. & Ad. 19.) Thus, upon a writ in the plaintiff's name merely, without affixing any character, the plaintiff may sue in the declaration as assignee or executor. (*Knowles* v. *Johnson*, 2 Dowl. 653.) But upon a writ describing the plaintiff as suing *as* executor (*Douglas* v. *Irlam*, 8 T. R. 416), or as suing *qui tam* (*Delves* v. *Strange*, 6 T. R. 158), the plaintiff cannot declare in his own right. The plaintiff was allowed to declare in his own right where the writ merely described him "*executor*," without stating that he sued *as* executor. (*Free* v. *White*, 1 Dowl. N. S. 586.) The same rules apply with regard to the defendant. But where the writ summons a party in his own name, the plaintiff cannot proceed against him as the public officer or representative of a company; for by so doing he would substantially change the defendant. (*Christie* v. *Bell*, 16 M. & W. 669.)

If the plaintiff's cause of action accrue to him in a peculiar character, or if the defendant is liable only in a peculiar character, the statement in the declaration must be framed accordingly, otherwise a variance would appear upon the evidence. By r. 5, T. T. 1853, the character in which the plaintiff or defendant is stated on the record to sue or to be sued shall not in any case be considered as in issue, unless specially denied.

Competency of the parties to sue and be sued, and to appoint an attorney.]—In general every person may appear and sue or defend in person, or by attorney. (1 Chit. Pr. 11th ed. 82.) A declaration omitting to show whether the plaintiff sued in person or by attorney might be set aside as irregular. (*White* v. *Feltham*, 3 C. B. 658.) A party cannot appear by two attorneys, and it would be an irregularity to appear by two upon the record. (*Williams* v. *Williams*, 10 M. & W. 174, 178, 476.)

The above general rule is subject to exceptions on account of various personal disabilities, such as marriage, infancy, lunacy, etc. A married woman cannot appoint an attorney. (*Oulds* v. *Sanson*, 3 Taunt. 261.) Where a husband and wife sue or are sued jointly, the husband may appoint an attorney for both. (2 Wms. Saund. 213.) A married woman sued alone must appear in person, and may then plead her coverture in abatement (2 Chit. Pr. 11th ed. 1242); or if the action is founded upon a contract made during coverture, the coverture may be pleaded in bar. (2 Chit. Pr. 10th ed. 1242; and see *post*, "Husband and Wife").

An infant cannot sue or appear either in person or by attorney; but must sue by *prochein ami* or by *guardian* (2 Chit. Pr. 11th ed. 1230), and defend by *guardian* only. (*Ib.* 1234.) A *prochein ami* is appointed by the Court, and may sue without any authority from the infant. (*Morgan* v. *Thorne*, 9

action (*e*) *and conclude as follows:*] And the plaintiff claims £——.

Dowl. 228; *Lees* v. *Smith*, 5 H. & N. 632.) Infants cannot appoint an attorney. (*Bird* v. *Pegg*, 5 B. & Ald. 418.) The infant however is the real party to the suit, and the attorney appointed for him is his attorney, so as to be liable to the infant and not to the *prochein ami* for the conduct of the suit and for the money recovered. (*Collins* v. *Brook*, 29 L. J. Ex. 255; 4 H. & N. 270; 5 H. & N. 700.) But an infant joint-executor with others may join with them in suing by attorney; though he could not, if sole executor, sue at all. (*Foxwist* v. *Tremaine*, 2 Wms. Saund. 212; 38 Geo. III. c. 87, s. 6; 4 Wms. Ex. 5th ed. 201.)

An idiot must appear in person; but another person may be admitted to plead for him. (4 Rep. 124. b.; 2 Wms. Saund. 333.) A lunatic retains all his civil rights in his own person until found by inquisition to be of unsound mind. He may appear by attorney (2 Wms. Saund. 333), or he may appear in person; and any person for him may sue in his name. (*Rock* v. *Slade*, 7 Dowl. 22; and see *Gleddon* v. *Treble*, 30 L. J. C. P. 160; 9 C. B. N. S. 367.)

The practice in reference to parties under disabilities will be found fully explained in 2 Chit. Pr. 11th ed. caps. xi. xii. xiv. The pleadings in such cases will be found in the Precedents, *post*.

(*e*) *Joinder of several counts.*]—At common law the declaration might join several causes of action in several counts, provided they were between the same parties, in the same rights, and framed in the same form of action. (See *Shepherd* v. *Shepherd*, 1 C. B. 849.) And formerly when variances between the evidence and the record could not be amended at *nisi prius*, it was necessary to provide against a variance by framing counts to meet every possible contingency which might arise upon the evidence.

By the 9 Geo. IV. c. 15, and by the Common Law Amendment Act, 3 & 4 Will. IV. c. 42, s. 23, the powers of amendment at the trial in cases of variance were greatly enlarged, and by the rules of pleading, made under the authority of the last-mentioned Act, several counts were not allowed unless a distinct subject-matter of complaint was intended to be established in respect of each, and provision was made for the opposite party to object to several counts used in apparent violation of that rule.

These rules have been superseded by the rules framed under the C. L. P. Act, 1852, which contain the following regulations upon this subject:—By r. 1, T. T. 1853, "Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms, as to costs or otherwise, as such court or a judge may think fit." And by r. 2, T. T. 1853, it is provided, "that on an application to the court or a judge to strike out any count on the ground of such count being in violation of the above rule, the court or a judge may allow such counts on the same cause of action as may appear to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs or otherwise, as the court or judge may think fit." And by r. 3, "when no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count founded on the same cause of action, and the judge before whom the cause is tried shall certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count in respect of which he has failed to establish a distinct cause of action, including those of the evidence as well as those of the pleading."

The present rules vary materially from those made under the powers given by the 3 & 4 Will. IV. c. 42. The prohibition to use several counts does

[*Insert here the full amount of the claim* (*f*), *or if the action is brought*

not now extend to such as are founded on the *same subject-matter of complaint*, but only to those framed on the *same cause of action*, a change of expression which appears to allow a wider scope to the pleader. And the judges have now a discretion to allow such counts as may appear to be proper for determining the real question in controversy between the parties on the merits, although they may perhaps be an infringement of the letter of the rule. This discretion is liberally exercised. (See the decisions under the former rules, and practice as to the use of several counts, 1 Chit. Pr. 11th ed. 234.)

In practice it is advisable to insert in a declaration as many different counts as will fairly include the various causes of action resulting from all the facts relied upon. But it is useless and objectionable to multiply counts (as is too frequently done) by stating the same cause of action in various ways.

The restriction as to the nonjoinder of different forms of action was done away with by the C. L. P. Act, 1852, s. 3, by which the mention of the form of action in the writ is rendered unnecessary, and by s. 41, by which causes of action of whatever kind, except replevin or ejectment, provided they be by and against the same parties and in the same rights, may be joined in the same suit.

The several counts in a declaration must still be between the same parties and in the same rights, except that by the C. L. P. Act, 1852, s. 40, in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit.

The misjoinder of counts, except as above mentioned, renders the whole declaration bad upon general demurrer, or upon error, or in arrest of judgment. (*Brigden* v. *Parkes*, 2 B. & P. 424; *Rose* v. *Bowler*, 1 H. Bl. 108; *Jennings* v. *Newman*, 4 T. R. 347; *Corner* v. *Shew*, 3 M. & W. 350; *Ashby* v. *Ashby*, 7 B. & C. 444.) Thus counts charging a defendant as executor or administrator cannot be joined with counts charging him personally in his own right. (Ibid.; and see *post*, Executors.)

(*f*) *The claim of debt or damages.*]—The claim at the conclusion of the declaration should be sufficient to cover the largest amount of debt or damages likely to be recovered; for the jury cannot give more than the amount thus claimed. (*Cheveley* v. *Morris*, 2 W. Bl. 1300.) When a verdict was given and judgment entered for a sum exceeding the claim in the declaration, and error was assigned on that ground, the court allowed the judgment to be amended by entering a *remittitur* for the excess. (*Usher* v. *Dansey*, 4 M. & S. 94.) If the jury assess the damages at a greater amount, the plaintiff may move for a new trial, and for leave to amend the declaration, which might be granted on payment of costs. (*Tebbs* v. *Barron*, 4 M. & G. 844.) An amendment might now perhaps in some cases be allowed under the 222nd section of the C. L. P. Act, 1852. Where the cause of action is one which entitles the plaintiff to interest, the claim should be large enough to include the full amount. (*Watkins* v. *Morgan*, 6 C. & P. 661; *Hudson* v. *Fawcett*, 7 M. & G. 348.) The amount of the claim is not restricted by the indorsement of the debt on the writ.

Where the plaintiff's claim can be ascertained exactly, it is better to claim only the precise amount. Otherwise, if the defendant should pay money into court, or plead a defence to the exact sum in dispute, and also plead the general issue to the residue, the plaintiff would incur the costs of a *nolle prosequi*, or of a verdict against him in respect of such residue. Where the plaintiff seeks to recover interest up to the time of judgment, the precise amount cannot be inserted. In order to avoid this difficulty,

to recover specific goods, conclude thus :] And the plaintiff claims a return of the said goods or their value and £—— for their detention.

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some pleaders have adopted the following form :—"And the plaintiff claims £—— (*the exact amount of the debt, and interest up to the date of the writ of summons*), with interest on £—— (*the exact amount of the debt only*) at £—— per cent. per annum, from the date of the writ of summons herein until payment or judgment."

Where, to a general count, a general plea is pleaded, if the plaintiff recover less than the amount claimed, the defendant is entitled to a verdict for the residue; and where there has been a dispute about such residue, he will be entitled to the costs incurred in his successful defence. (*Traherne* v. *Gardner*, 26 L. J. Q. B. 259; 8 E. & B. 161.) Where there has been no dispute and no costs incurred about the residue, the verdict for the defendant in respect of it is of no material consequence.

With the above-mentioned exceptions, the amount claimed in the conclusion of the declaration is immaterial. It is treated as meaning any sum which the plaintiff can prove.

Damages.]—Damages are distinguished in law as *general* and *special* damages: the former being the necessary and immediate loss occasioned by the injurious act of the defendant; the latter comprising the loss which follows as its natural and proximate consequence beyond its necessary and immediate effect. This distinction leads to the following rule in pleading: that if special damage is intended to be claimed, it must be stated with particularity in the body of the declaration; but general damage requires no particular mention, and is covered by the general claim at the conclusion. (See *Boorman* v. *Nash*, 9 B. & C. 145, 152; *Rodgers* v. *Nowill*, 5 C. B. 109.)

Where the act of the defendant complained of is in itself a legal injury to the plaintiff, as a breach of contract or a trespass, the law always implies general damage at least to a nominal amount. (*Ashby* v. *White*, 1 Smith's L. C. 4th ed. 185; *Marzetti* v. *Williams*, 1 B. & Ad. 415; and see *Beaumont* v. *Greathead*, 2 C. B. 494.) Where the act complained of is not in itself necessarily injurious to the plaintiff, but becomes so only by reason of the special damage caused by it, the special damage has then to be stated and proved as the gist of the action and in order to establish the injury, and not merely in the sense of damage. (See Counts, *post*, "*Reversion*," "*Negligence*," "*Sheriff*," etc.)

The object of stating special damage in the declaration where not alleged as an essential part of the cause of action, is to give notice to the defendant of the nature and extent of the claim made against him, and of the particular facts by which it is to be supported, so as to enable him to come to trial prepared with evidence to meet it. The charge of general damage is sufficiently notified in the statement of the injury, which imports all its necessary and immediate effects, and no further particularity is required in respect of it. (*Smith* v. *Thomas*, 2 Bing. N. C. 372, 380.) The special damage must be charged with sufficient particularity to inform the defendant what the plaintiff intends to prove, and the plaintiff is not allowed to give evidence of any special damage which is not sufficiently stated in the declaration. (1 Wms. Saund. 243 c. n. (5.); *Hartley* v. *Herring*, 8 T. R. 130.) Thus, in an action for an imprisonment, the plaintiff cannot prove as damage that he suffered in health, unless he has charged it in the declaration (*Pettit* v. *Addington*, Peake 62); or that he was stinted of food in prison. (*Lowden* v. *Goodrick*, Peake 46.)

So in an action by a tradesman for defamation whereby several customers left him, he cannot prove as damage that any particular customer has left him unless the customer be named in the declaration (*Browning* v. *Newman*, 1 Strange, 666; 1 Wms. Saund. 243 & 5); and, in an action by a woman for defamation, an allegation that she thereby lost several suitors is insufficient

[*If the declaration contains a count for the recovery of specific goods, and also a count or counts for other causes of action, the conclusion*

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to admit evidence of any particular suitor having deserted her (*Hartley* v. *Herring*, 8 T. R. 130, 132); and, under an allegation of special damage by a loss of the plaintiff's lodgers, he was not allowed to prove the loss of a particular lodger. (*Westwood* v. *Cowne*, 1 Stark, 172.)

But in an action for defamation by the preacher at a chapel, it was held sufficient to allege generally as special damage, that some persons of his congregation had withdrawn their support, without naming them (*Hartley* v. *Herring*, 8 T. R. 130); and a general loss of business or custom may be alleged and proved without having recourse to particular instances. (*Rose* v. *Groves*, 5 M. & G. 613; *Evans* v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 251.)

The statement of the special damage must sufficiently show its connection with the injurious act as a natural and proximate consequence, otherwise it cannot be recovered even though assessed by the jury. (*Crouch* v. *Great Northern Ry. Co.* 25 L. J. Ex. 137; *Hoey* v. *Felton*, 31 L. J. C. P. 105.)

Matter which would constitute a distinct cause of action cannot in general be charged or given in evidence as special damage, and should form the subject of a distinct count; such matter however may be given in evidence, if material to the claim sued for, though it cannot be made a ground for claiming damages. (*Pearson* v. *Lemaitre*, 5 M. & G. 700.) Thus, in an action for defamation, subsequent libels published by the defendant of the plaintiff are admissible in evidence to prove the malicious motive of the defendant, and cannot be excluded on the ground that they may disclose distinct causes of action. (Ib. and see *Hemmings v. Gasson*, 27 L. J. Q. B. 252.)

If the plaintiff fails in proving the special damage alleged, he may still resort to and recover his general damages. (*Smith* v. *Thomas*, 2 Bing, N. C. 372, 380.) Thus, in an action for defamation, the plaintiff was held entitled to prove and recover for a general loss of trade, though the declaration also alleged a loss of particular customers which he failed to prove. (*Evans* v. *Harries*, 26 L. J. Ex. 31; 1 H & N. 251.)

All the circumstances under which an injury was committed may be stated and proved in order to aggravate and enhance the damages (*Newman* v. *Smith*, Salk. 642; *Dix* v. *Brookes*, 1 Str. 61); as in an action of trespass for entering the plaintiff's house, that the defendant did it under a false charge that the plaintiff had stolen goods therein (*Bracegirdle* v. *Oxford*, 2 M. & S. 77); and the jury may take all the circumstances into their consideration in assessing the amount of damages. (*Merest* v. *Harvey*, 5 Taunt, 442; and see *Wilson* v. *Hicks*, 26 L. J. Ex. 242; *Emblen* v. *Myers*, 30 L. J. Ex. 71; 6 H. & N. 54; *Bell* v. *Midland Ry. Co.* 30 L. J. C. P. 273.) There is, however, a distinction between actions of tort and of contract in this respect, in the latter in general no damages more than nominal can be recovered that are not capable of being specifically stated and appreciated, except in the case of a breach of a contract to marry, when the injury to the plaintiff's feelings may also be taken into account. (*Hamlin* v. *Great Northern Ry. Co.* 26 L. J. Ex. 20; and see *Emblen* v. *Myers*, *supra*.)

The allegation of special damage cannot be answered or pleaded to on the record, for such a plea would afford no answer to the cause of action (*Smith* v. *Thomas*, 2 Bing. N. C. 372, 379; *Porter* v. *Izat*, 1 M. & W. 381; *Warre* v. *Calvert*, 7 A. & E. 143; *Reindel* v. *Schell*, 27 L. J. C. P. 146; 4 C. B. N. S. 97); except where the special damage constitutes the gist of the action; it is then stated as part of the cause of action, and is denied by the plea of the general issue. (*Wilby* v. *Elston*, 8 C. B. 142; and see per Bramwell, B., *Eastwood* v. *Bain*, 28 L. J. Ex. 74, 77.)

The defendant may give evidence to rebut the proof of special damage offered by the plaintiff, or in mitigation of the damage proved; as in an action of libel the defendant may give evidence in mitigation of damages,

may be thus :] And the plaintiff claims under the —— count a return of the goods therein mentioned or their value, and £—— for their detention, and under the residue of the declaration £——.

By a Plaintiff who has been described in the Writ by a wrong Name.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, at whose suit the writ of summons was issued herein by the name of *C. B.*, by *D. E.* his attorney [*or* in person], sues *F. G.*, for [*here state the cause of action in the usual form*], and the plaintiff claims £——

Against a Defendant who has been described in the Writ by a wrong Name.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, who has been summoned herein by the name of *G. F.*, for [*here state the cause of action in the usual form*], and the plaintiff claims £——.

By several Plaintiffs, or against several Defendants.

The form is the same as the ordinary form, except that the several names, both Christian and surnames, of the plaintiffs and defendants, are inserted in the first place, and they are afterwards called "*plaintiffs*" or "*defendants*," as the case may be.

By a surviving Partner or Joint-Promisee, the other having died before Writ issued.

The commencement of the declaration is in the ordinary form, but in the body the cause of action must be stated to have accrued jointly to the plaintiff and to the deceased partner or joint-promisee, describing the latter as "since deceased." (*Jell* v. *Douglas*, 4 B. & Ald. 374.) [*See the forms, post; and conclude thus :*] And the plaintiff claims £——.

Form of declaration by a surviving plaintiff in an action of tort : Morison v. *Salmon*, 2 M. & G. 385.

By a surviving Plaintiff, the other having died after Writ issued. (*C. L. P. Act*, 1852, *ss.* 135, 136.)

In the ——.

The ——day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*,

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that the plaintiff published libels of him, and was of bad reputation. (*Watts* v. *Fraser*, 7 A. & E. 223; *Richards* v. *Richards*, 2 M. & Rob. 557.) But matter which, if pleaded, would amount to an answer or justification of the cause of action cannot, without being pleaded, be proved in mitigation of damages. (*Linford* v. *Lake*, 3 H. & N. 276; and see *Perkins* v. *Vaughan*, 4 M. & G. 988.)

As to the measure of damages in particular actions, see the separate titles, *post*.

who has been summoned to answer the said *A. B.*, and *G. H.*, who died after the issuing of the writ of summons herein and before this day, for [*here state the cause of action, which in the body must be alleged to have accrued* to the plaintiff and the said *G. H. See the form post; conclude:*] And the plaintiff claims £——.

See form of commencement in this case: Higgs v. *Mortimer*, 1 Exch. 711.

Against a surviving Partner or Joint-contractor, the other having died either before or after Writ issued.

The declaration in the commencement, body, and conclusion, may be in the ordinary form, without any reference to the deceased. *Richards* v. *Heather*, 1 B. & A. 29; *Jell* v. *Douglas*, 4 B. & A. 374; *Mountstephen* v. *Brooke*, 1 B. & A. 224. (*a*)

Against two Defendants after a Plea in Abatement of the non-joinder of one of them. (*C. L. P. Act*, 1852, *s.* 60.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.* and *G. H.*, which said *E. F.* has heretofore pleaded in abatement the non-joinder of the said *G. H.* for [*here state the cause of action as in the ordinary form against two defendants, and conclude thus:*] And the plaintiff claims £——.

Form where the Writ against two Defendants was specially indorsed, and after judgment signed against one for non-appearance the Plaintiff proceeds against the other, suggesting the Judgment. (*C. L. P. Act*, 1852, *s.* 33.) (*b*)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sued out a

(*a*) The 136th s. of the C. L. P. Act, 1852, so far as regards defendants, appears to apply only to the case of a defendant dying after declaration, as, independently of its provisions, a plaintiff might omit in the declaration any defendant named in the writ, see *ante*, p. 5. See a form of declaration against two survivors on a promissory note made by three jointly. *Robertson* v. *Sheward*, 1 M. & G. 511.

(*b*) In an action upon a joint contract against several defendants, if one suffers judgment by default, the judgment is interlocutory until the determination of the suit; and if the plaintiff fails to establish the joint liability against the other defendants, his judgment against the former never becomes final and will not be available (*Morgan* v. *Edwards*, 6 Taunt. 398); so, in proceeding against the other defendants, the plaintiff is not entitled to be nonsuited, but must submit to a verdict against him. (*Hannay* v. *Smith*, 3 T. R. 662.) Under the C. L. P. Act, 1852, s. 33, in any action brought against two or more defendants where the writ is specially indorsed in the form provided by s. 25, which is confined to claims arising upon contract, if one or more of such defendants only shall appear, and another or others of them shall not appear, the plaintiff may sign judgment against such defendant or defendants only as shall not have appeared, and, before declaration against the other defendant or defendants, may issue execution there-

writ of summons against *E. F.* and *G. H.*, indorsed according to the Common Law Procedure Act, 1852 [*add if necessary*, and the Summary Procedure on Bills of Exchange Act, 1855], as follows: [*Here copy the special indorsement.*] And the plaintiff suggests and gives the Court here to understand and be informed that the said *E. F.* has not appeared to the said writ, and that by reason thereof judgment herein has been obtained and signed against the said *E. F.* in respect of the premises; and thereupon the plaintiff by his said attorney declares against the said *G. H.*, who has appeared to the said writ for [*here state the cause of action in the ordinary form of a declaration against two defendants, showing that it accrued against both, see forms post. It must agree strictly with the claim appearing on the special indorsement. Conclude thus:*] And the plaintiff claims £——. [*This amount must not exceed the sum claimed by the special indorsement unless interest be also claimed thereby, in which case the plaintiff will be entitled as against both defendants to interest up to the date of final judgment, and this amount should be increased accordingly, see ante, p. 7, n. (f.)*]

By an Executor (*a*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, executor of the last will and testament of *C. D.*, deceased, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff as executor as aforesaid claims £——.

By a surviving Executor.

The last form is sufficient in this case, and may be used without alteration, even where it is intended to rely on causes of action accruing to the joint-executors during their joint lives.

By an Executor of an Executor (*b*).

upon, in which case he shall be taken to have abandoned his action against the defendant or defendants who shall have appeared; or the plaintiff may, before issuing such execution, declare against such defendant or defendants as shall have appeared, stating by way of suggestion the judgment obtained against the other defendant or defendants who shall not have appeared, in which case the judgment so obtained against the defendant or defendants who shall not have appeared, shall operate and take effect in like manner as a judgment by default obtained before the commencement of this act against one or more of the several defendants in an action of debt before the commencement of this act.

If the plaintiff takes the latter course and proceeds against the defendants who appear, the above form is necessary. In actions for wrongs independent of contract, the plaintiff is entitled to his judgment by default against one defendant, although he fails against the other, because each defendant is severally liable for the wrong. (*Pozzi* v. *Shipton*, 8 A. & E. 963.)

(*a*) In actions by executors, they ought all to join, though some be infants, or have not proved the will; but if one only bring an action, the defendant can take advantage of it only by pleading in abatement. (1 Wms. Saund. 291 *k*, *l*; *post*, *Pleas*, "*Abatement.*")

(*b*) It would not be any variance if the preceding form were adopted in

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, executor of the last will and testament of *E. F.*, deceased, who in his lifetime and at the time of his death was executor of the last will and testament of *C. D.*, deceased, by *G. H.* his attorney [*or* in person], sues *I. K.* for [*here state the cause of action, see the forms post, and conclude thus :*] And the plaintiff as executor as aforesaid claims £——.

Against an Executor (*c*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, executor of the last will and testament of *G. H.*, deceased, for [*here state the cause of action, see the forms post, and conclude thus :*] And the plaintiff claims £——.

[*This form is equally applicable where the defendant is the legal personal representative, and where he is executor* de son tort.

It also applies in an action against a surviving executor, and generally speaking to the case of an executor of an executor defendant; if in the latter instance it be necessary or advisable to show the defendant's exact position, the commencement of the declaration may be framed on the model of the last preceding form.]

By the Executor of a sole Plaintiff who has died after Writ issued, suggesting his death and the appointment of the Executor. (*C. L. P. Act*, 1852, *s.* 137.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, executor of the last will and testament of *C. D.*, deceased, by *E. F.* his attorney [*or* in person], by leave of the Court here [*or* of the honourable Mr. Justice *or* Baron ——], suggests and gives the Court to be informed that the said *C. D.* in his lifetime, on the —— day of ——, A.D. ——, sued out of this court a writ of summons against *G. H.* in this action, and afterwards died, and that the said *A. B.* is executor of the last will and testament of the said *C. D.*; and the said *A. B.* as executor as aforesaid by his said attorney [*or* in person], sues the said *G. H.* for [*here state the cause of action showing that it accrued to the deceased :*] And the said *A. B.* as executor as aforesaid claims £——.

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this case, as the executor of an executor may be described as the executor of the first testator, and profert of the letters testamentary is no longer necessary. It may however in some cases be necessary or advisable to declare on causes of action which accrued to the first executor in his lifetime, and under such circumstances this form of commencement must be used.

(*c*) All the executors may be joined as defendants; but it is only necessary to join so many as have administered; if any of the latter are not joined, the defendant may object by pleading in abatement, but in no other manner. (*Post*, *Pleas*, "*Abatement.*")

Against the Executor of a sole Defendant who has died after Writ issued, suggesting his death and the appointment of the Executor. (*C. L. P. Act*, 1852, *s.* 138.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], suggests and gives the Court to be informed that he sued out a writ of summons in this action against *E. F.* in the lifetime of the said *E. F.* on the —— day of ——, A.D. ——, and the said *E. F.* afterwards died, and that *G. H.* is the executor of the last will and testament of the said *E. F.*; and the said *A. B.*, by his said attorney [*or* in person], sues the said *G. H.*, executor as aforesaid, for [*here state the cause of action against the deceased, which must be such that it survives against the executor, and conclude thus:*] And the plaintiff claims £——.

A like form where the defendant died after declaration, and after the plaintiff had obtained leave to amend it: Phelps v. *Prothero*, 16 C. B. 370.

By an Administrator.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator of the personal estate and effects (*a*), which were of *C. D.*, deceased, who died intestate, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

[*This form may also be used without alteration in the case of a surviving administrator.*]

By an Administrator with the Will annexed.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator of the personal estate and effects which were of *C. D.*, deceased, with the last will and testament of the said *C. D.* annexed, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

By an Administrator de bonis non *with the Will annexed.*

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator, with the last will and testament of *C. D.*, deceased, annexed, of the personal estate and effects which were of the said *C. D.* left unadministered by *E. F.* and *G. H.* in

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(*a*) This is the phrase used in the probates and letters of administration now granted by the Court of Probate. (*See the Forms* 27 L. J. P. 26.) It may be adopted in all cases.

their lifetime, now respectively deceased, who were the executors of the last will and testament of the said *C. D.*, by *J. K.* his attorney [*or* in person], sues *L. M.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

By an Administrator de bonis non *after the death of the first Administrator.*

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator of the personal estate and effects which were of *C. D.*, deceased, left unadministered by *E. F.* in his lifetime, now deceased, who was the administrator of the personal estate and effects of the said *C. D.*, by *G. H.* his attorney [*or* in person], sues *J. K.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

By an Administrator during the Minority of an Executor.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator of the personal estate and effects which were of *C. D.*, deceased, during the minority of *E. F.*, an infant under the age of twenty-one years, who is executor of the last will and testament of the said *C. D.*, by *G. H.* his attorney [*or* in person], sues *J. K.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

Form by an administrator with the will annexed during the minority of an executor: White v. *Hancock*, 2 C. B. 830.

By an Administrator during the absence of the Executor.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, administrator of the personal estate and effects which which were of *C. D.*, deceased, during the absence of *E. F.*, now being beyond the seas, who is executor of the last will and testament of the said *C. D.*, by *G. H.* his attorney [*or* in person], sues *J. K.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff, as administrator as aforesaid, claims £——.

As to the title of an Administrator durante absentiâ, see *Clare* v. *Hedges*, 1 Lutw, 342; 2 P. Wms. 579; *Slater* v. *May*, 2 L. Raym. 1071; 1 Wms. Ex. 5th ed. 438; *Webb* v. *Kirby*, 25 L. J. C. 872; 26 L. J. C. 145.

Against an Administrator.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*,

administrator of all and singular the personal estate and effects which were of *G. H.*, deceased, who died intestate, for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff claims £——.

Against an Administrator with the Will annexed.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, administrator of the personal estate and effects which were of *G. H.*, deceased, with the last will and testament of the said *G. H.* annexed, for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff claims £——.

Against an Administrator de bonis non *with the Will annexed.*

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, administrator with the last will and testament of *G. H.*, deceased, annexed, of the personal estate and effects, which were of the said *G. H.* left unadministered by *J. K.* and *L. M.* in their lifetime, now respectively deceased, who were the executors of the last will and testament of the said *G. H.*, for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff claims £——.

By or against the Administrator of a sole Plaintiff or Defendant, who has died after Writ issued, suggesting his Death, and the Appointment of the Administrator. (C. L. P. Act, 1852, ss. 137, 138.)

These forms may be framed from those given for executors, ante, pp. 13, 14.

Against an Heir (*a*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, heir of *G. H.*, deceased, for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiff claims £——.

Against an Heir and Devisee jointly. (1 *Will. IV. c.* 47, *s.* 3.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, heir of *G. H.*, deceased, and *J. K.*, devisee of the said *G. H.*, of divers lands and hereditaments, which were of the said *G. H.*, de-

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(*a*) In the declaration against an heir, it is not necessary to state how the defendant is heir. (*Denham* v. *Stephenson*, Salk. 355.) An heir sues as plaintiff in the ordinary form, but must state his title in the body of the declaration; and see 2 Wms. Saund. 7 *n* (*e*).

ceased, by his last will and testament, for [*here state the cause of action, see form post, and conclude thus:*] And the plaintiff claims £——.

Form against devisee alone, there being no heir-at-law, under sect. 4, see Hunting v. *Sheldrake*, 9 M. & W. 256.

Against an Heir and the Devisee of the Devisee jointly.
(1 *Will. IV. c.* 47, *s.* 3.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.*, heir of *G. H.*, deceased, and *J. K.*, devisee of *L. M.*, deceased, of divers lands and hereditaments, which were of the said *G. H.*, deceased, by the last will and testament of the said *L. M.*, and which said lands and hereditaments were devised by the said *G. H.* by his last will and testament to the said *L. M.*, for [*here state the cause of action, see form post, and conclude thus:*] And the plaintiff claims £——.

By Husband and Wife.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C.* [*the Christian name of the wife*] his wife, by *D. E.* their attorney [*or* in person], sue *F. G.* for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiffs claim £——.

[*If the declaration contain a count by husband and wife for an injury done to the wife, and also a count by the husband in his own right, under the C. L. P. Act*, 1852, *s.* 40, *the conclusion may be thus:*] And the plaintiffs claim under the —— count £——, and the plaintiff *A. B.* claims under the —— count £——.

Against Husband and Wife.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.* and *G.* [*the Christian name of the wife*] his wife, for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiff claims £——.

By Husband and Wife Executrix (*a*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C.* [*the Christian name of the wife*] his wife,

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(*a*) Where a married woman is executrix, her husband must be joined in all actions by and against her, and she cannot obtain probate or administer without the consent of her husband; but the personal estate of the deceased vests in her immediately upon the death, and a payment or delivery of the property to her *bonâ fide* made before the dissent of the husband, and before probate is valid. *Pemberton* v. *Chapman*, 7 E. & B. 210. If the wife, being executrix, sues alone, the defendant can only object by pleading in abatement. (See *post*, *Pleas*, "*Abatement.*")

executrix of the last will and testament of *D. E.*, deceased, by *F. G.* their attorney [*or* in person], sue *H. J.* for [*here state the cause of action, see forms post, and conclude thus:*] And the said *A. B.* and *C.* his wife, as executrix as aforesaid, claim £——.

Against Husband and Wife Executrix.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney, sues *E. F.* and *G.* [*the Christian name of the wife*] his wife, executrix of the last will and testament of *H. J.*, deceased, for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiff claims £——.

By Husband and Wife Administratrix.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C.* [*the Christian name of the wife*], his wife, administratrix of the personal estate and effects, which were of *D. E.*, deceased, who died intestate, by *F. G.* their attorney [*or* in person], sue *H. J.* for [*here state the cause of action, see forms post, and conclude thus:*] And the said *A. B.* and *C.* his wife, as administratrix as aforesaid, claim £——.

[*If the wife is administratrix with the will annexed, etc., the more particular description can be taken from such of the above forms as may be found applicable.*]

Against Husband and Wife Administratrix.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.* and *G.* [*the Christian name of the wife*] his wife, administratrix of the personal estate and effects, which were of *H. J.* deceased, who died intestate, for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiff claims £——.

[*If the wife is administratrix with the will annexed, etc., the more particular description can be taken from such of the above forms as may be found applicable.*]

By an Infant. (*a*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.*, who is admitted by the Court here as the next friend of the said *A. B.*, to prosecute for him [*or* her] the said *A. B.*, being an infant within the age of twenty-one years, sues *E. F.* for [*here state the cause of action, and conclude thus:*] And the plaintiff claims £——.

(*a*) See *ante*, p. 5, n.

Against an Infant.

The commencement and conclusion are both in the ordinary form.

By the Assignees of a Bankrupt (before the Bankruptcy Act, 1861) (a).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C. D.*, assignees of the estate and effects of *E. F.*, a bankrupt, according to the statutes in force concerning bankrupts, by *G. H.* their attorney [*or* in person], sue *J. K.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiffs, as assignees as aforesaid, claim £——.

By the Official Assignee of a Bankrupt under the Bankruptcy Act, 1861 (b).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, the official assignee of the estate and effects of *C. D.*, a bankrupt, according to the statutes in force concerning bankrupts, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiff, as assignee as aforesaid, claims £——.

By the Creditors' Assignee [or Assignees] of a Bankrupt under the Bankruptcy Act, 1861.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* [and *C. D.*], the creditors' assignee [*or* assignees] of the estate and effects of *E. F.*, a bankrupt, according to the statutes in force concerning bankrupts, by *G. H.* his [*or* their] attorney [*or* in person], sues [*or* sue] *J. K.* for [*here state the cause of action, see the forms post, and conclude thus:*] And the plaintiff as assignee as aforesaid, claims [*or* the plaintiffs, as assignees as aforesaid, claim] £——.

By the Assignees of an insolvent Debtor (c).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C. D.*, assignees of the estate and effects of *E. F.*, an insolvent debtor, according to the statutes in force for the

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(*a*) The Bankruptcy Act, 1861, does not affect any proceedings pending, or any rights that have arisen or may arise in respect of any transaction, matter, or thing done or existing prior to or at its commencement, under the statutes then in force, 24 & 25 Vict, c. 134, s. 230. The forms of pleadings previously in use will therefore still be required.

(*b*) As to the rights of action by assignees under the Bankruptcy Act, 1861, see *post*, "*Assignees*," p. 60.

(*c*) The jurisdiction in insolvency is abolished, except as to pending proceedings, by the Bankruptcy Act, 1861, ss. 19, 20.

relief of insolvent debtors in England, by *G. H.* their attorney [*or* in person], sue *J. K.* for [*here state the cause of action, see forms post, and conclude thus:*] And the plaintiffs, as assignees as aforesaid, claim £——.

By the Official Assignee of an insolvent Debtor under the Arrangement Clauses in the Bankrupt Law Consolidation Act, 1849 (12 *&* 13 *Vict. c.* 106, *s.* 218).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, the assignee of the estate and effects of *C. D.*, a petitioner under the clauses of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements between debtors and their creditors, under the superintendence and control of the Court of Bankruptcy, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, and conclude thus:*] And the plaintiff, as assignee as aforesaid, claims £——.

By the Trustee of the estate and effects of a petitioning debtor appointed by a resolution of creditors under 7 & 8 Vict. c. 70: *see s.* 8; *and see Chilcote* v. *Kemp,* 3 Ex. 514.

By a Trustee under the arrangement clauses in the Bankruptcy Act, 1861 (24 *&* 25 *Vict. c.* 134, *s.* 197).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, the trustee on behalf of the creditors of *C. D.*, a debtor, under a deed or instrument made and entered into between the said *C. D.* and [certain of] his said creditors and the plaintiff as trustee as aforesaid, relating to the debts and liabilities of the said *C. D.* and his release therefrom [*or* the distribution, inspection, management, and winding up of his estate], according to the clauses of the Bankruptcy Act, 1861, relating to trust-deeds for benefit of creditors; and under which said deed or instrument, all things necessary in that behalf having happened and been done, all the property comprised in the said deed or instrument, including the causes of action hereinafter mentioned, was and is vested in the plaintiff as such trustee as aforesaid, by *E. F.* his attorney [*or* in person], sues *G. H.* for [*here state the cause of action, and conclude thus:*] And the plaintiff, as trustee as aforesaid, claims £——.

By the Assignees of a Bankrupt Partner and the Solvent Partner.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C. D.* and *E. F.*, which said *C. D.* and *E. F.* are assignees of the estate and effects of *G. H.*, a bankrupt, according to the statutes in force concerning bankrupts, by *J. K.* their attorney, sue *L. M.* for [*here state the cause of action, see form post, and conclude thus:*] And the said *A. B.* and the said *C. D.* and *E. F.*, as assignees as aforesaid, claim £——.

[*This form can be readily adapted, from the preceding forms, to the case of an action brought by the solvent partner jointly with the official assignee or the creditor's assignee or assignees under the Bankruptcy Act*, 1861.]

By or against a Corporation.

Corporations sue and are sued in the ordinary form by their corporate name, which is set out in full; but they cannot sue or defend otherwise than by attorney. (Chit. Pr. 10th ed. 71, 1095.) After they have been once mentioned by their corporate name at the commencement, they may be styled "*the plaintiffs*" or "*the defendants*" throughout the body of the declaration. The proper style of the municipal corporation of a borough (by 5 & 6 Will. IV. c. 76, s. 6), is "The Mayor, Aldermen, and Burgesses of ——;" in the case of a city, it is "The Mayor, Aldermen, and Citizens of the City of ——." *Attorney-General* v. *City of Worcester*, 15 L. J. C. 398; *Bateman* v. *Mayor, etc., of Ashton*, 3 H. & N. 323.

By or against a Railway, Canal, or other Company incorporated by Special Act of Parliament.

These companies sue and are sued in the ordinary form by the name by which they are incorporated.

By or against a Joint Stock Company.

Joint stock companies, whether under the Act for the Registration, Incorporation, and Regulation of Joint Stock Companies (7 & 8 Vict. c. 110), which still applies to certain insurance companies (*a*) (20 & 21 Vict. c. 80), or under the Joint Stock Companies Acts, 1856, 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14), sue and are sued in the ordinary form by their registered name of incorporation. (*Woolf* v. *The City Steamboat Company*, 7 C. B. 103; 2 Chit. Pr. 10th ed. 1097.) In the case of a company formed with limited liability, the word "*limited*" forms the last word of the name, and must be added, in suing, to the rest of the name. (19 & 20 Vict. c. 47, ss. 5, 13.) And in like manner the word "*registered*" must be added to the name of a company formed under the 7 & 8 Vict. c. 110, see sect. 25. After the name of the company has been set out once at the commencement, the words "*the plaintiffs*" or "*the defendants*" may be used throughout the body of the declaration.

By or against a Joint Stock Banking Company under 20 *&* 21 *Vict. c.* 49, *and* 21 *&* 22 *Vict. c.* 91.

These companies are now regulated by the Joint Stock Banking Companies Act, 1857, 20 & 21 Vict. c. 49, and the Act of 21 & 22

(*a*) Insurance companies carrying on other business besides that of insurance are within the Joint Stock Companies Acts, and, if not registered according to their provisions, are incapable of suing. (*London Monetary Advance and Ins. Co.* v. *Smith*, 3 H. & N. 543; 27 L. J. Ex. 479.)

Vict. c. 91, enabling such companies to be formed with limited liability. These Acts repeal the Act previously in force for the regulation of Joint Stock Banking Companies, 7 & 8 Vict. c. 113, and incorporate the Joint Stock Companies Acts, 1856, 1857. Accordingly, under the provisions of the last-mentioned Acts, these companies sue and are sued like other joint stock companies in the ordinary form by their registered name of incorporation.

After the name of the company has been once set out at the commencement, the words "*the plaintiffs*" or "*the defendants*" may be used throughout the body of the declaration.

Form of commencement by a joint stock banking company within section 6 *of the* 20 *&* 21 *Vict. c.* 49, *and registered under that Act. Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; *Liverpool Borough Bank* v. *Mellor*, 28 L. J. Ex. 78; 3 H. & N. 551.

By the Public Officer of a Banking Company or Copartnership under 7 *Geo. IV. c.* 46, *s.* 4.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, one of the registered public officers of a banking company called the [*insert the proper style*], who is duly appointed and entitled by virtue of the statutes in that behalf to sue in this action as nominal plaintiff for the said company, by *C. D.* his attorney, sues *E. F.* for [*here state the cause of action, alleging the debt or cause of action to have accrued to, or the agreement, covenant, or bond, etc., to have been made with or to the company, not the plaintiff, and conclude thus:*] And the plaintiff, as such public officer as aforesaid, for and on behalf of the said company, claims £——. (*Such a company is bound to sue in the name of their public officer, and cannot sue by trustees or otherwise: Chapman* v. *Milvain*, 5 Ex. 61. *These companies are not affected by the Joint Stock Banking Companies Act*, 1857: *see forms in Christie* v. *Peart*, 7 M. & W. 491; *Davidson* v. *Bower*, 4 M. & G. 626; *form where the banking company has changed its name: Wilson* v. *Craven*, 8 M & W. 584.)

Against the Public Officer of a like Company or Copartnership.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* by *C. D.*, his attorney [*or* in person], sues *E. F.*, one of the registered public officers of a banking company called the [*insert the proper style*] who is duly appointed and liable by virtue of the statutes in that behalf to be sued as nominal defendant for the said company, for [*here state the cause of action, alleging the debt or cause of action to have accrued against the company, not the defendant, and conclude thus:*] And the plaintiff claims £——.

A like form: Rolin v. *Steward*, 14 C. B. 595.

By the Public Officer of a Company empowered by Letters Patent under 7 *Wm. IV. &* 1 *Vict. c.* 73, *s.* 3.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, one of the registered public officers of the ——.

company, duly appointed to sue and be sued on behalf of the said company, under and by virtue of certain letters patent granted by Queen Victoria to the said company, according to an Act of Parliament passed in the first year of the reign of the said Queen, for the better enabling the said Queen to confer certain powers and immunities on trading and other companies, by *C. D.* his attorney, sues *E. F.* for [*here state the cause of action, alleging that it accrued to the company, not to the plaintiff, and conclude thus :*] And plaintiff, as such public officer as aforesaid, for and on behalf of the said company, claims £——.

Against the public officer of a like company, see Galloway v. *Bleaden*, 1 M. & G. 247.

By the Secretary, Treasurer, Chairman, etc., of a Partnership or Company empowered by Statute to sue in the name of such person in their behalf (a).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, the secretary [*or as the case may be*] of the —— company, being the company mentioned in an Act of Parliament passed in the —— year of the reign of Queen Victoria, for [*state the object of the Act as described in its title*], by virtue of and according to the said statute, for and on behalf of the said company, by *C. D.* his attorney, sues *E. F.* for [*here state the cause of action, alleging that it accrued to the company, not to the plaintiff, and conclude :*] And the plaintiff, as such secretary [*or as the case may be*], for and on behalf of the said company, claims £——.

Like forms : M'Intyre v. *Miller*, 13 M. & W. 725 ; *Smith* v. *Goldsworthy*, 4 Q. B. 430 ; *Reddish* v. *Pinnock*, 10 Ex. 213.

By an Official Manager (under the Joint Stock Companies Winding-up Act, 1848 ; 11 *&* 12 *Vict. c.* 45, *s.* 50) (*b*).

In the ——

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* [*the name need not be stated in the writ or in the declaration*] official manager of the —— company duly appointed according to the statute in that behalf, as such official manager, by *C. D.* his attorney, sues *E. F.* for [*here state the cause of action, and conclude thus :*] And the plaintiff, as such official manager as aforesaid, claims £——.

(*a*) The act constituting the partnership sometimes gives it a *quasi-corporate* name, in which it may sue or be sued ; and sometimes it requires a memorial to be enrolled in Chancery before the partnership can avail itself of the provisions of the Act. It is usual to aver a compliance with such requirement in a general manner, but the omission of the averment cannot be made an objection on demurrer. (*Smith* v. *Goldsworthy*, 4 Q. B. 430.)

(*b*) The above statute does not apply to companies registered under the Joint Stock Companies Acts, 1856, 1857 : see s. 108 of the former of these Acts. By s. 90, the official liquidator appointed under these Acts is to

Against an Official Manager.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney, sues *E. F.*, official manager of the —— company, duly appointed according to the statute in that behalf as such official manager, for [*here state the cause of action, and conclude:*] And the plaintiff claims £——.

Like forms: Prince of Wales Ass. Co. v. *Harding*, 27 L. J. Q. B. 297; *Russell* v. *Croysdill*, 11 Ex. 123; *Royal British Bank* v. *Turquand*, 5 E. & B. 248.

By or against a Foreign Public Company established under the laws of a foreign country (*a*).

(*Venue.*) The [*insert the proper style of the company*] being a body of persons duly constituted without the dominions and jurisdiction of the Queen, that is to say, in the kingdom of ——, for the purpose [*state the purpose of the company*], and being entitled and empowered by the law and customs of the said kingdom [to make and enter into the contract hereinafter mentioned and] to sue and be sued in and by their said name and style, by *A. B.* their attorney, sue *C. D.* for [*here state the cause of action, and conclude:*] And the plaintiffs claim £——.

By a foreign corporation: National Bank of St. Charles v. *De Bernales*, 1 C. & P. 569.

By the Syndics of a French Bankrupt: Alivon v. *Furnival*, 1 C. M. & R. 277.

By the Governor of a Belgian Society: Meeus v. *Thellusson*, 8 Ex. 638.

By a company established by acts of a Colonial Legislature: Welland Railway Co. v. *Blake*, 30 L. J. Ex. 161; *Welland Railway Co.* v. *Berrie*, 30 L. J. Ex. 163.

[*The commencement of a declaration against a foreign company may be readily framed from the above.*]

By the Trustees of a Friendly Society (*b*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.* and *C. D.*, trustees of the [*state the title of the society,*] established in pursuance of the statutes relating to Friendly Societies, the rules of which society have been duly certified by the registrar of friendly societies in England, by *E. F.* their attorney,

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bring and defend actions in the *name* and on behalf of the company. (See such counts in *Magdalena Steam Nav. Co.* v. *Martin*, 28 L. J. Q. B. 310; *Anglo-Californian Mining Co.* v. *Lewis*, 30 L. J. Ex. 50.)

(*a*) As to when a foreign company or an individual member thereof should sue or be sued, see *General Steam Navigation Company* v. *Guillou*, 11 M. & W. 877; *Ingate* v. *Austrian Lloyd's Co.*, 27 L. J. C. P. 323; *National Bank of St. Charles* v. *De Bernales*, 1 C. & P. 569 *and n* (*a*).

(*b*) As to the statutes regulating friendly societies and the proper parties to sue and be sued, see *post*, "*Friendly Societies.*"

sue *G. H.* for [*here state the cause of action, and conclude:*] And the plaintiffs, as trustees of the said society as aforesaid, claim £——.

Like forms: Dewhurst v. *Clarkson*, 3 E. & B. 194; *Sinden* v. *Bankes*, 30 L. J. Q. B. 102.

By the trustees of a loan society: Albon v. *Pyke*, 4 M. & G. 421.

By the treasurer of a loan society under 3 *&* 4 *Vict. c.* 110, *s.* 161, *continued by* 21 *&* 22 *Vict. c.* 19: *Timms* v. *Williams*, 3 Q. B. 413.

By the Clerk to a Local Board of Health of a Non-corporate District (under the Public Health Acts, 11 *&* 12 *Vict. c.* 63, *s.* 138, *and* 21 *&* 22 *Vict. c.* 98).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, clerk to the Local Board of Health for the —— [*state the district according to the fact*], as such clerk, by *C. D.* his attorney, sues *E. F.* for [*here state the cause of action, and conclude:*] And the plaintiff, as such clerk as aforesaid, claims £——.

A like form: Cobham v. *Holcombe*, 8 C. B. N. S. 815.

Against the Clerk to a Local Board of Health of a Non-corporate District.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) (*a*) *A. B.*, by *C. D.* his attorney, sues *E. F.*, clerk to the Local Board of Health for the [*state the district*], as such clerk, for [*state the cause of action, and conclude:*] And the plaintiff claims £——.

See actions against such clerk: Ward v. *Lowndes*, 28 L. J. Q. B. 265.

Against a Local Board of Health of a corporate district: Itchin Bridge Co. v. *Local Board of Health of Southampton*, 28 L. J. Q. B. 41.

By or against Clerks, etc., to Commissioners, Trustees, and other Public Bodies.

By the clerk of the trustees of a turnpike-road: Wellington v. *Brown*, 15 L. J. Q. B. 23; *of a harbour: Metcalfe* v. *Hetherington*, 11 Ex. 257.

Against the clerk to the committee of visitors of a county pauper lunatic asylum, under 8 *&* 9 *Vict. c.* 126, *s.* 17: *Kendall* v. *King*, 17 C. B. 403; *Moffatt* v. *Dickson*, 13 C. B. 543.

Against the clerk to commissioners appointed for certain purposes, under a local Act of Parliament: Hall v. *Taylor*, 27 L. J. Q. B. 311; *Ruck* v. *Williams*, 3 H. & N. 308; 27 L. J. Ex. 357.

(*a*) By s. 139 of 11 & 12 Vict. c. 63, every action against a Local Board of Health, for anything done or intended to be done under the provisions of that Act, shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere. Therefore in such actions the venue is local; but they may be tried in another county by order of the court or a judge. (*Itchin Bridge Company* v. *Local Board of Health of Southampton*, 27 L. J. Q. B. 128; 8 E. & B. 803 *n.* (a); and see *ante*, p. 3.)

Against the clerk to commissioners of sewers: Clements v. *Pollard*, 10 Ex. 817.

By the Guardians of the Poor of a Union or Parish (*a*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) The guardians of the poor of the —— union [*or* parish of ——], in the county of ——, by *A. B.* their attorney, sue *C. D.* for [*here state the cause of action, and conclude:*] And the plaintiffs claim £——.

Against the guardians of the poor of a union: Smart v. *West Ham Union*, 10 Ex. 867.

By or against Churchwardens and Overseers, etc.

By churchwardens and overseers, under 59 Geo. III. c. 12, s. 17: *Ward* v. *Clarke*, 12 M. & W. 747.

Against Hundredors.

Hundredors are sued in the ordinary form, by the name of "The men inhabiting within the hundred of ——, in the county of ——."

By an Informer in a Qui tam Action (*b*).

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, as well for the Queen [*or*, the poor of the parish of ——, in the county of ——], as for himself, by *C. D.* his attorney, [*or* in person], sues *E. F.* for [*here state the cause of action, and conclude:*] And the plaintiff claims as well for the said Queen [*or* for the poor of the said parish] as for himself £—— (*c*).

(*a*) By the 5 & 6 Will. IV. c. 69, s. 7, for the more easy execution of the laws relating to the poor, it is enacted that the guardians of the poor of every union shall be for all the purposes of that Act a corporation by the name of the guardians of the poor of the —— union [*or* of the parish of ——], in the county of ——; and, as such corporation, they are empowered to take and hold for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal, and are further empowered by that name to bring actions and to sue and be sued, and to take or resist all other proceedings in relation to any such property, or any bonds, contracts, securities, or instruments, given to them in virtue of their office; and in every such action relating to any such property it shall be sufficient to lay or state the property to be that of the guardians of the —— union or of the parish of ——.

(*b*) In penal actions by a common informer the venue is local, but not in actions given to the party grieved. See *post*, "*Penal Statutes.*" No authority from the Crown or from the party entitled to the penalty to sue need be shown in the declaration. (*Cole* v. *Coulton*, 29 L. J. M. 125.) And see further, as to the form of the declaration, *post*, "*Penal Statutes*," p. 202.

(*c*) The sum claimed must be the exact amount of the penalty. In penal actions no damages are recoverable for the detention of the debt, because the debt is not due until judgment. (*Frederick* v. *Lookup*, 4 Burr. 2018; *Cuming* v. *Sibly*, 4 Burr. 2489.)

A like form: Hollis v. *Marshall,* 2 H. & N. 755.

Form in a qui tam *action by the treasurer of a borough suing as well for the borough as for himself: Hunt* v. *Hibbs,* 29 L. J. Ex. 222.

Commencement of Declaration in an Action removed by Certiorari from the County Court.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) Whereas a plaint was levied on the —— day of ——, A.D. —— (*a*), in the county court of ——, at ——, against *C. D.*, at the suit of *A. B.*, and by a writ of *certiorari* duly issued on the —— day of ——, A.D. ——, out of the Court of ——, and directed to the judge of the said county court, the said plaint with all things touching the same were sent into the said Court of ——: hereupon the said *A. B.*, by *E. F.* his attorney [*or* in person], declares against the said *C. D.* for [*here state the cause of action, and conclude:*] And the plaintiff claims £——.

(*Where the removal is from any other inferior court, the commencement may easily be framed from the above* mutatis mutandis.)

In an Action removed from the Court of Passage at Liverpool.

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) Whereas *C. D.* was summoned to answer *A. B.* in the Court of Passage of the borough of Liverpool, in the county of Lancaster, by virtue of a writ of summons issued on the —— day of ——, A.D. ——, out of the last-mentioned court, and by a writ of *certiorari* duly issued on the —— day of ——, A.D. ——, out of the Court of ——, and directed to the judge of the said Court of Passage, the said action with all things touching the same were sent into the said Court of ——: hereupon the said *A. B.*, by *E. F.* his attorney [*or* in person], declares against the said *C. D.* for [*here state the cause of action, and conclude:*] And the plaintiff claims £——.

Against a Garnishee, under the C. L. P. Act, 1854. (17 *&* 18 *Vict. c.* 125, *s.* 64; *R. G. M. V.* 1854, *sched.* 25.)

In the ——.

The —— day of ——, A.D. ——.

(*Venue.*) *A. B.*, by *C. D.* his attorney [*or* in person], sues *E. F.* by a writ issued forth of this Court in these words, Victoria, etc. [*copy the writ*], and the said *E. F.* has appeared to the said writ, and the said *A. B.*, by his attorney aforesaid [*or* in person], says that the said debt due from the said *E. F.* to the said *G. H.* [*the judgment debtor named in the writ*] is for [*here state the debt as in a declaration in ordinary cases*]. And the said *A. B.* prays that execution may be adjudged to him accordingly for the said £——, and for costs of suit in this behalf.

(*a*) It is advisable to show the date of the plaint on the record, in case a plea of the Statute of Limitations or a demurrer should make it material.

CHAPTER II.

COUNTS IN ACTIONS ON CONTRACTS.

THE COMMON INDEBITATUS COUNTS.

(*a*). *Indebitatus counts in general*].—Simple contracts, express or implied, resulting in mere debts, are of so frequent occurrence as causes of action, that certain concise forms of counts have been devised for suing upon them, in which it is sufficient to state the cause of action by a general description, reserving the particular circumstances of the debt to be given in evidence. (*Streeter* v. *Horlock*, 1 Bing. 37; *Stone* v. *Rogers*, 2 M. & W. 448: 2 Wms. Saund. 349 *b* (2)).

These counts, which have from time to time been rendered more and more concise, are designated, with little difference of meaning, by the terms *indebitatus counts*, *money counts*, or *common counts*; the expression *common counts* or *common indebitatus counts* being often used to designate those of most frequent recurrence, viz. where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression *money counts* being sometimes used to particularize those for money lent, money paid, and money received. The most appropriate name seems to be *indebitatus counts*; for although there is now no word in the declaration answering to this term, the plea is still *nunquam indebitatus*. Counts which state the cause of action more fully are called *special counts*. There were also formerly in use counts known as *quantum meruit* and *quantum valebat* counts, which were adopted where there was no fixed price for work done or goods sold, etc. (1 Chit. Pl. 7th ed. 351.) These counts however have fallen into disuse, and have been superseded by the general application of the indebitatus counts.

Before the C. L. P. Act, 1852, it was necessary to specify in the writ the particular form of action adopted, and the form of the declaration varied accordingly. Causes of action of the above nature might then be made the subject either of an action of *debt* or of an action of *assumpsit*. When framed in debt, the declaration stated the debt, and then averred that by reason of the non-payment thereof, an action accrued (*actio accrevit*). In assumpsit the declaration stated the debt, and then averred a promise by the defendant to pay the debt (*indebitatus assumpsit*), and a breach of that promise, such promise being one which would be implied by law from the debt, and not requiring proof as a fact. This alternative form of remedy was very important at a time when different forms of actions could not be joined in the same declaration, as it enabled the plaintiff to add a claim for a simple contract debt to any special counts in assumpsit (the different form of count leading to the distinction between indebitatus assumpsit and special assumpsit); and, on the other hand, when the declaration was framed in debt, the plaintiff could add any other counts which fell under the latter form of action. These different forms of action however were attended with different consequences, not only in the form of the

pleadings, but also in the subsequent proceedings. In *debt*, in which the cause of action is technically said to sound in debt, the judgment was final in the first instance, the claim for damages being generally nominal only; in *assumpsit*, which is said to sound in damages, a subsequent inquiry to assess the damages was necessary. Thus the form of the judgment and the object of joining various causes of action in the same declaration, generally determined the choice of the remedy, and preserved both forms of declaration in constant use.

These distinctions are now removed by the operation of the C. L. P. Act, 1852. By the effect of sect. 3, a plaintiff is no longer required to specify the particular form of action in which he sues. By sect. 41, causes of action, of whatever kind, except replevin or ejectment, may be joined in the same suit. By sect. 49, it is enacted that the statement of promises in indebitatus counts which need not be proved, shall be omitted. And by sects. 93, 94, and 95, the same conveniences as to final judgment and the assessment of damages are extended to all causes of action to which they can be applied. There is now therefore but one form of indebitatus count, which comprises all the advantages of both the forms under the old procedure; and the action of *indebitatus assumpsit* is virtually become obsolete. It is however frequently necessary to bear in mind the distinction between the indebitatus counts in *debt* and in *assumpsit*, with reference to the state of the law of pleading previous to the recent change.

The following observations apply to the use of the indebitatus counts in general. Explanatory notes with reference to the particular counts will be found under each title.

The form of indebitatus count applies only in suing for a debt or liquidated demand in money; not for an unliquidated demand or damages. (*Edwards* v. *Bates*, 7 M. & G. 594; *Lawrence* v. *Wilcock*, 11 A. & E. 941.) The amount of the debt is deemed to be certain, provided it is capable of being ascertained.

Wherever a consideration is executed for which a debt, payable at the time of action, has accrued due either under an express promise or under one implied by law, the debt may be sued for in an indebitatus count. (*Clark* v. *Bulmer*, 11 M. & W. 243; *Beverley* v. *Lincoln Gas Co.*, 6 A. & E. 837; *Russell* v. *Bell*, 10 M. & W. 340.) And wherever the terms and conditions of any special agreement, not under seal, have been performed and satisfied, so as to leave a mere debt due to the plaintiff, he may sue in an indebitatus count, reserving the contract and the completion of it to be proved in evidence. (Ib.; *Stone* v. *Rogers*, 2 M. & W. 448; *Lucas* v. *Godwin*, 3 Bing. N. C. 737; *Clutterbuck* v. *Coffin*, 3 M & G. 842; *Sheldon* v. *Cox*, 3 B. & C. 420; *Prickett* v. *Badger*, 26 L. J. C. P. 33; 1 C. B. N. S. 96; *Seeger* v. *Duthie*, 29 L. J. C. P. 253; 8 C. B. N. S. 45.)

The indebitatus counts apply only in cases of simple contract debts, and not to specialty debts (2 Wms. Saund. 349 *b* (2)); nor to original simple contract debts which have been merged in a specialty debt or debt of record. (*Middleditch* v. *Ellis*, 2 Ex. 623; *Baber* v. *Harris*, 9 A. & E. 532; *Edwards* v. *Bates*, 7 M. & G. 590; *Price* v. *Moulton*, 10 C. B. 561; *Atty* v. *Parish*, 1 B. & P. N. R. 104; *King* v. *Hoare*, 13 M. & W. 494; but see *Tilson* v. *Warwick Gas Co.*, 4 B. & C. 962.) A deed executed for the sole purpose of securing a simple contract debt, does not merge that debt in the speciality. (*Marryat v. Marryat*, 29 L. J. C. 665; *Courtney* v. *Taylor*, 6 M. & G, 851, 870.) These counts may be used if the debt can be established independently of the deed. (*Tilson* v. *Warwick Gas Co.*, 7 D. & R. 381; *Edwards* v. *Bates*, 7 M. & G. 600; *Yates* v. *Aston*, 4 Q.B. 182.)

An indebitatus count is not applicable when a contract remains in part unperformed, as in *Cutter* v. *Powell* (2 Smith, L. C. 5th ed. 1); nor so long as it remains still open. (*Towers* v. *Barrett*, 1 T. R. 133, 136; per

Tindal, C. J., *James* v. *Cotton*, 7 Bing. 266; *Edwards* v. *Bates*, 7 M. & G. 599; *Fitt* v. *Casanett*, 4 M. & G. 898.) Nor so long as any condition remains to be performed precedent to the debt. (*Scott* v. *Parker*, 1 Q. B. 809; *Simmons* v. *Swift*, 5 B. & C. 857.) Under the form of indebitatus count in use before the C. L. P. Act, 1852, it was held that where a debt was agreed to be paid by instalments, none of the instalments could be sued for separately in that form of count before the whole debt was due. (*Rudder* v. *Price*, 1 H. Bl. 547; and see *Ambergate Ry. Co.* v. *Coulthard*, 5 Ex. 549; *North-Western Ry. Co.* v. *Coulthard*, 6 Ex. 273, 278.) So where the plaintiff sold goods to the defendant to be paid for partly in cash and the residue by bills at intervals of three months each, and the defendant did not pay the cash or deliver the bills, it was held that the plaintiff must sue upon the special contract and could not recover even the cash payment under the indebitatus count for goods sold and delivered. (*Paul* v. *Dod*, 2 C. B. 800.)

Where a special contract has been rescinded, either by mutual consent or by such a breach on one side as entitles the other to rescind, and goods, labour, etc., have been provided by one party under the special contract, and retained by the other party after the rescission, the value may be recovered in this form of count, provided a new contract can be implied to pay the value of the consideration actually received. (*Planché* v. *Colburn*, 8 Bing. 14; *De Bernardy* v. *Harding*, 8 Ex. 822; *Simpson* v. *Lamb*, 25 L. J. C. P. 113; 17 C. B. 603; *Prickett* v. *Badger*, 26 L. J. C. P. 33; 1 C. B. N. S. 96; *Lamburn* v. *Cruden*, 2 M. & G. 253; *Turner* v. *Robinson*, 5 B. & Ad. 789.)

Forms of indebitatus counts are given in schedule (B) to the C. L. P. Act, 1852, and by sect. 91 it is declared that those forms shall be sufficient, but that it shall not be erroneous or irregular to depart from the letter of the forms so long as the substance is expressed without prolixity. The omission of the words "money payable," renders the count bad on demurrer for not showing a money debt payable *in præsenti* (*Place* v. *Potts*, 8 Ex. 705; *Wilkinson* v. *Sharland*, 10 Ex. 724; 11 Ex. 33); unless the count shows it otherwise, as the count "for money found to be due on accounts stated." (*Fagg* v. *Nudd*, 3 E. & B. 650.) The averment of the "request" of the defendant need not be stated where the consideration of itself necessarily imports a request, as in the case of goods sold and delivered, goods bargained and sold, money lent, money received, and accounts stated; in other cases, as in the counts for work done, and for money paid, and for interest, a request must be alleged. (*Victors* v. *Davies*, 12 M. & W. 758; and see *Brown* v. *Garnier*, 6 Taunt. 389; *Berdoe* v. *Spittle*, 1 Ex. 175.) A count for goods sold not stating "by the plaintiff" would be bad. (*Fenton* v. *Ellis*, 6 Taunt. 192.) So also a count for money received "for and on account of" the plaintiff, not stating "for his use." (*Kelly* v. *Curzon*, 4 A. & E. 622.)

The Common Indebitatus Counts.]—The above observations show that this general mode of declaring is admissible in all cases of simple contracts where the consideration has been executed and the action is brought to recover a mere money debt. The special varieties of this kind of declaration are therefore very numerous. There are however certain counts of this kind, containing the causes of action of the most comprehensive form and most frequent occurrence, which have been more particularly designated as the *common indebitatus counts;* these are the eight counts already mentioned, viz. for goods sold and delivered, for goods bargained and sold, for work done, for money lent, for money paid, for money received, for interest, and upon accounts stated. In consequence of the general use of these counts, both separately and joined with special counts, it has been thought convenient to place them in a prominent position at the head of the other precedents: the more special forms of indebitatus counts will be found throughout the precedents under their proper titles.

The common Indebitatus Count for Goods sold and delivered (a).

Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant.

(a) *Goods sold and delivered.*]—This count is applicable where, upon a sale of goods, the property has passed and the goods have been delivered to the purchaser, and the price is payable at the time of action brought.

This count will not lie before delivery. (*Smith* v. *Chance*, 2 B. & Ald. 753; *Boulter* v. *Arnott*, 1 C. & M. 333.) Nor, if the sale was upon credit, before the credit has expired. (*Strutt* v. *Smith*, 1 C. M. & R. 312; *Webb* v. *Fairmaner*, 3 M. & W. 473; *Paul* v. *Dod*, 2 C. B. 800; *Ferguson* v. *Carrington*, 9 B. & C. 59.) But it may be used after the credit has expired, and the price has become immediately payable. (*Helps* v. *Winterbottom*, 2 B. & Ad. 431.) A bill taken for the price has the same effect as credit in postponing the action on the common count until the bill is due. (*Helps* v. *Winterbottom*, 2 B. & Ad. 431); so also has an agreement to pay by a bill. (*Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 B. & P. 582.) Where goods have been delivered upon a conditional sale and the sale has become absolute by the performance of the condition, the price may be recovered on the common count (*Bianchi v. Nash*, 1 M. & W. 545); so the price of goods delivered "on sale or return," and not returned within a reasonable time, may be sued for in this form. (*Moss* v. *Sweet*, 20 L. J. Q. B. 167; *Beverley* v. *Lincoln Gas Co.*, 6 A. & E. 829.)

Upon a contract of exchange of goods with a sum payable for equality of exchange, this count will lie to recover the money after the exchange has been effected (*Sheldon* v. *Cox*, 3 B. & C. 420); but not for the value of goods delivered by one party under a mere contract of exchange not performed by the other. (*Harrison* v. *Luke*, 14 M. & W. 139.)

Contracts of sale sometimes arise from the mere acceptance by the defendant of goods delivered by the plaintiff for the purpose of sale, and the value may be recovered in this count. (See *Hart* v. *Mills*, 15 M. & W. 87.) In such case the defendant must have some option in accepting or returning the goods and becoming bound to the plaintiff to pay for them, otherwise he cannot be held liable, as no contract or privity can be implied. Thus, where the defendant ordered goods of one person, and the plaintiff a different person sent the goods, and the defendant consumed the goods before he had notice that they belonged to the plaintiff, it was held that he was not liable to the plaintiff for the price, because not having any option of returning the goods to the plaintiff he did not enter into any contract with him. (*Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; and see *Taylor* v. *Laird*, 25 L. J. Ex. 329; *Munro* v. *Butt*, 8 E. & B. 738.)

Where goods have been delivered by the plaintiff to the defendant under the terms of a special contract of sale, and the defendant has rendered the completion of the contract impossible, he may be charged in this count with the value of the goods received by him under the contract; as where the contract was that the defendant should pay for the goods by a valuation to be made by two valuers, and before the valuation could be made the defendant consumed the goods and so rendered the valuation impossible, he was held liable for the value of the goods in this count. (*Clarke* v. *Westrope*, 18 C. B. 765; 25 L. J. C. P. 287; and see *Keys* v. *Harwood*, 2 C. B. 905.)

So also where in contracts for the sale and delivery of goods by the plaintiff to the defendant, the plaintiff after delivering part has failed to deliver any more, the defendant may rescind the contract and return the part delivered; but if he elects to keep it after the time for the completion of the contract is expired, he becomes liable for the value under this count. (See *Shipton* v. *Casson*, 5 B. & C. 378, 382; *Oxendale* v. *Wetherell*, 9 B. & C. 386.)

So where under a contract of sale the goods delivered are not according to the contract, they may be returned; but if they are kept, the seller may claim

The common Indebitatus Count for Goods bargained and sold (a).

Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.

The common Indebitatus Count for Work done (b).

Money payable by the defendant to the plaintiff for work done

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their value under the new contract implied from their acceptance. (*Read* v. *Rann*, 10 B. & C. 438, 441; *Hart* v. *Mills*, 15 M. & W. 85.)

In some cases where the defendant has wrongfully obtained goods of the plaintiff and has appropriated them to his own use, the plaintiff may waive the tort and claim the value of his property which the defendant has so appropriated, as a debt arising from a sale of the property, provided there are circumstances from which a contract may be implied. (Per Lord Abinger, C. B., *Russell* v. *Bell*, 10 M. & W. 340, 352.)

Thus where the defendant fraudulently induced the plaintiff to sell goods to a third person for the purpose of getting them into his own possession, and appropriated them to his own use, the plaintiff was held entitled to claim the value of the goods as upon a sale to the defendant. (*Hill* v. *Perrott*, 3 Taunt. 274; *Biddle* v. *Levy*, 1 Stark. 20.)

Where a bankrupt, after an act of bankruptcy, disposed of the goods in his possession to the defendant, by way of sale, the assignees of the bankrupt were held entitled to claim the value of the goods from the defendant. (*Russell* v. *Bell*, 10 M. & W. 340; see also *Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 191.)

But, as a general rule, where the defendant has obtained the goods of the plaintiff by means of a fraudulent contract, the plaintiff cannot assert any other contract than that in fact made; he must either sue upon that or disaffirming it must sue in an action of tort. (*Read* v. *Hutchinson*, 3 Camp. 352; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Strutt* v. *Smith*, 1 C. M. & R. 312; *Selway* v. *Fogg*, 5 M. & W. 83.)

Under the common count for goods sold, several sales at different times may be proved and the total amount recovered. (per Parke, B., *Ferguson* v. *Mitchell*, 2 C. M. & R. 691; *Jubb* v. *Ellis*, 3 D. & L. 367.)

(*a*) *Goods bargained and sold.*]—This count lies where upon a sale of goods the property has passed to the purchaser, and the contract has been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment.

If the property has not passed, this count will not lie. (*Atkinson* v. *Bell*, 8 B. & C. 277.) Nor if anything remains to be done under the contract, as to ascertain the price of the goods by weighing. (*Simmons* v. *Swift*, 5 B & C. 857.) Upon a sale of un-ascertained goods by mere description, this count will not lie; but upon a subsequent appropriation of specific goods made by the vendor and assented to by the vendee, the price may be recovered under this count (*Rohde* v. *Thwaites*, 6 B. & C. 388; *Elliott* v. *Pybus*, 10 Bing. 512.) As to what constitutes appropriation under such a contract, see *Aldridge* v. *Johnson*, 7 E. & B. 885; 26 L. J. Q. B. 296; *Langton* v. *Higgins*, 4 H. & N. 402.

Where goods were sold on condition that if not paid for at a specified time, the vendor might re-sell them, and the vendee should be answerable for any loss on the re-sale, and the vendee did not pay, and the vendor resold, it was held that he could not maintain an action on this count. (*Lamond* v. *Davall*, 9 Q. B. 1030.)

If the goods have been actually delivered, and the delivery was part of the consideration for payment, this count is not applicable; but the count or goods sold and delivered should be used. (See Chit. Forms, 9th ed. 84 n.)

(*b*) *Work done.*]—This count lies for work and services done and materials provided by the plaintiff at the request of the defendant.

and materials provided by the plaintiff for the defendant at his request.

Work under this count includes labour of all kinds, whether mental or physical, or both, as the contrivance of a machine (*Grafton* v. *Armitage*, 2 C. B. 336); or the services of medical men, apothecaries, attorneys, surveyors, farriers, etc. A printer who prints with his own ink and paper, and delivers printed books complete, may recover for his work, labour, and materials, under this count. (*Clay* v. *Yates*, 25 L. J. Ex. 237; 1 H. & N. 73.) But although under the general term "work" used in this count, any species of labour may be given in evidence (*Clark* v. *Mumford*, 3 Camp. 37), it is usual to point out the cause of action more particularly by describing the kind of work or the character in which the work has been done, as, work done by the plaintiff as an attorney, an auctioneer, a broker, etc.; it is prudent however, and not unusual, in such cases to add the words "and otherwise," in order that the plaintiff may not be restricted in his proofs. If there be a claim for materials provided in and about the work, it must be stated in the count, otherwise it cannot be recovered. (*Heath* v. *Freeland*, 1 M. & W. 543.) Nor can it be recovered in the count for goods sold and delivered. (*Cotterell* v. *Apsey*, 6 Taunt. 322; *Clark* v. *Bulmer*, 11 M. & W. 243.) Work bestowed by the plaintiff on his own materials in making an article to be delivered to the defendant under a contract of sale, cannot be recovered under this count, because such work is done for himself, and not for the purchaser; and the subject of the contract should be treated as goods and not as work and labour. (*Atkinson* v. *Bell*, 8 B & C. 277; *Lee* v. *Griffin*, 30 L. J. Q. B. 252.) Contracts which fall under the description of work and labour, although they result in the delivery of completed goods, are not within the 17th sect. of the Statute of Frauds. (*Clay* v. *Yates*, 25 L. J. Ex. 237; 1 H. & N. 73; *Lucas* v. *Godwin*, 3 Bing. N. C. 737.)

Where work is done by one party under a special contract, but not according to its terms, the other may refuse to accept it (*Ellis* v. *Hamlen*, 3 Taunt. 52); but if he does accept it and takes the benefit of it, he may be sued for the value in this count (*Burn* v. *Miller*, 4 Taunt. 745). If the work is of such a nature that it cannot be rejected, so that the party has no option in accepting it, he is not necessarily liable for the value; as work done under a building contract upon the defendant's land, but not according to the contract. (*Ellis* v. *Hamlen*, 3 Taunt. 52; *Milner* v. *Field*, 5 Ex. 829; *Munro* v. *Butt*, 8 E. & B. 738.)

Where the contract, retainer, or employment is to do work or render services to be paid for on their completion, as the employment of a house-agent to let a house or of an agent to sell goods, and the employer revokes the employment before the work is completed or prevents the completion of it, he must nevertheless reimburse the party employed for his labour expended in pursuance of the employment, and the latter may sue for his claim in this count. As where the defendant employed the plaintiff, an estate-agent, to find a purchaser for an estate on the terms of a percentage on the purchase-money, if a sale were effected, and the plaintiff found a purchaser, but the defendant refused to complete the sale; it was held that the plaintiff could recover the value of his services, on the common count for work and labour. (*Prickett* v. *Badger*, 26 L. J. C. P. 33; 1 C. B. N. S. 296; and see *Mavor* v. *Payne*, 3 Bing. 288; *Planché* v. *Colburn*, 8 Bing. 14.). The right of action in this form rests on the original contract being mutually rescinded, and the work having been done at the request of the defendant. (*De Bernardy* v. *Harding*, 8 Exch. 822.) But the contract in these cases is sometimes such as to admit the power of revocation in the employer, without any compensation for the services rendered (*Simpson* v. *Lamb*, 25 L. J. C. P. 113; 17 C. B. 603.)

Where the terms of the contract are such as to make the remuneration contingent upon the completion of the services, a partial performance will

The common Indebitatus Count for Money lent (a).

Money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.

The common Indebitatus Count for Money paid (b).

Money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request.

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not alone give any claim against the employer (Hulle v. Heightman, 2 East, 145; Cutter v. Powell, 6 T. R. 320; 2 Smith's L. C. 5th ed. 1; Appleby v. Dods. 8 East, 300; Jesse v. Roy, 1 C. M. & R. 316; Moffatt v. Laurie, 24 L. J. C. P. 56; Green v. Mules, 30 L. J. C. P. 343.)

(a) Money lent.]—This count lies to recover a debt arising out of a loan of money on a simple contract. Money deposited by a customer with a banker may be thus recovered. (*Pott* v. *Clegg*, 16 M. & W. 321; *Pollard* v. *Ogden*, 2 E. & B. 459.) An I O U alone will not support this count, for though it is proof of money owing, it is no more proof of money lent than of goods sold or any other source of a debt. (*Fesenmayer* v. *Adcock*, 16 M. & W. 449.) Nor will a check support this count. (*Pearce* v. *Davis*, 1 M. & Rob. 365.) Money lent on a contract to repay it on demand or to execute a mortgage, may, after a refusal by the borrower to execute a mortgage, be recovered under this count. (*Bristowe* v. *Needham*, 9 M. & W. 729.) It has been held that money advanced under a special contract of loan, which has been rescinded by agreement before completion, may be recovered under this count. (*James* v. *Cotton*, 7 Bing, 266.) Money lent upon a deposit of shares, which were to be returned upon repayment, may be thus recovered without a return of the shares, such return not being a condition precedent to the repayment. (*Scott* v. *Parker*, 1 Q. B. 809.)

A loan may be recovered under this count, though it has been secured by a mortgage, where the deed contains no covenant to repay. (*Yates* v. *Aston*, 4 Q. B. 182.) But where there is such a covenant, though a limited one, no other contract can be implied, and this count will not lie. (*Mathew* v. *Blackmore*, 26 L. J. Ex. 150; 1 H. & N. 762; *Brown* v. *Price*, 27 L. J. C. P. 290.) And it must be borne in mind that a covenant is in some cases implied from a mere acknowledgment of the debt in a deed, so as to have the effect of merging the simple contract in the specialty. (*Courtney* v. *Taylor*, 6 M. & G. 851, 870; *Marryat* v. *Marryat*, 29 L. J. C. 665.)

Money lent for an illegal purpose, as for wagering or for gaming at an illegal game cannot be recovered (*Cannan* v. *Bryce*, 3 B. & Ald. 179; *M'Kinnell* v. *Robinson*, 3 M. & W. 434); but money lent for the purpose of paying bets lost by the defendant to others than the plaintiff may be recovered. (*Hill* v. *Fox*, 4 H. & N. 359.)

(b) Money paid.]—This count is maintainable where there has been a payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied. (*Brittain* v. *Lloyd*, 14 M. & W. 762; *Lewis* v. *Campbell*, 8 C. B. 541.)

There must be actual payment, or what is equivalent to it (*Power* v. *Butcher*, 10 B. & C. 329, 346), of money of the plaintiff which he is entitled to be repaid. (*Goepel* v. *Swinden*, 1 D. & L. 888.) Giving a note, which is accepted as payment, is equivalent to money paid. (*Barclay* v. *Gooch*, 2 Esp. 571.) Executing a covenant to pay is not equivalent to payment of money (*Power* v. *Butcher*, 10 B. & C. 329); nor is the extinguishment of the debt by giving a new security. (*Taylor* v. *Higgins*, 3 East, 169; *Maxwell* v. *Jameson*, 2 B. & Ald. 51.) It has been held that the proceeds of goods sold as a distress for rent cannot be treated as money paid by the party distrained upon (*Moore* v. *Pyrke*, 11 East, 52); *aliter* where money

was paid by him to redeem the distress. (*Exall* v. *Partridge*, 8 T. R. 308.) As to money levied by sale of goods under a *fi. fa*, see *Rodgers* v. *Maw*, 15 M. & W. 444.

The payment must be at the request or by the authority of the defendant; a voluntary payment without request or authority is not sufficient. (*Stokes* v. *Lewis*, 1 T. R. 20; per Lord Kenyon, C. J., *Exall* v. *Partridge*, 8 T. R. 308, 310; and see *Pownal* v. *Ferrand*, 6 B. & C. 439.) A request or authority may be implied by the general course of dealing, or by the nature of the particular transaction; thus a person who employs a broker on the Stock Exchange, impliedly authorizes the latter to pay money for him according to the rules of the Stock Exchange. (*Westropp* v. *Solomon*, 8 C. B. 345; *Taylor* v. *Stray*, 26 L. J. C. P. 185, 287; 2 C. B. N. S. 175; *Smith* v. *Lindo*, 27 L. J. C. P. 335.) A request will generally be implied where the defendant has notice of the payment being made for him, and does not dissent. (*Paynter* v. *Williams*, 1 C. & M. 810; *Alexander* v. *Vane*, 1 M. & W. 511.) So where a payment has been compelled through the wrongful act of the defendant, of which he gets the benefit; as where an acceptance of the plaintiff was wrongfully indorsed by the defendant. (*Bleaden* v. *Charles*, 7 Bing. 246.) Where an insolvent, having made a composition with his creditors, gave acceptances to the defendant, being one of his creditors, for a larger amount than his composition, in fraud of the other creditors, and was afterwards compelled to pay the acceptances in the hands of third parties, he was held entitled to recover the amount from the defendant as money paid to his use. (*Bradshaw* v. *Bradshaw*, 9 M. & W. 29; and see *Smith* v. *Cuff*, 6 M. & S. 160.)

A request or authority will be implied where the plaintiff has been legally compelled to pay a debt for which the defendant is liable (per Tindal, C. J., *Grissell* v. *Robinson*, 3 Bing. N. C. 10, 15; *Jefferys* v. *Gurr*, 2 B. & Ad. 833); as where an executor has paid the legacy duty for which the legatee was liable. (*Foster* v. *Ley*, 2 Bing. N. C. 269; *Bate* v. *Payne*, 13 Q. B. 900.) And where the indorser of a bill was made to pay the defendant's acceptance. (*Pownal* v. *Ferrand*, 6 B. & C. 439; and see *Sleigh* v. *Sleigh*, 5 Ex. 514.)

Where a surety pays the debt of the principal debtor, he may recover it in this form of action (*Done* v. *Walley*, 2 Ex. 198); so where one co-contractor pays the whole debt for which the other co-contractors are jointly liable with him, he may sue each co-contractor, or the representatives of such as are deceased, for contribution in this form. (*Edger* v. *Knapp*, 5 M. & G. 753; *Kemp* v. *Finden*, 12 M. & W. 421; *Batard* v. *Hawes*, 2 E. & B. 287.) Where the plaintiff drew a bill and the defendant indorsed it as co-sureties for the acceptor, the plaintiff having paid it, was held entitled to recover contribution in this action. (*Reynolds* v. *Wheeler*, 30 L. J. C. P. 350.) But one of two joint wrong-doers having been compelled to pay the whole damage, cannot recover a moiety against the other (*Merryweather* v. *Nixan*, 8 T. R. 186; and see *Shackell* v. *Rosier*, 2 Bing. N. C. 648; and see as to where one wrong-doer can recover against the other upon an indemnity given, *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57.)

Where the plaintiff has been compelled, under a distress or threat of a distress to which he was liable, to pay the rent of the defendant's premises, he may sue for the amount in this action. (*Exall* v. *Partridge*, 8 T. R. 308; and see *Moore* v. *Pyrke*, 11 East, 52.) But where the plaintiff's goods, standing on the defendant's land, were seized for a tithe rent-charge, the plaintiff could not recover, because the rent was charged on the land only, and was not a personal liability of the defendant. (*Griffenhoofe* v. *Daubuz*, 25 L. J. Q. B. 237; 5 E. & B. 746.) So where the plaintiff and the defendant were underlessees at separate rents of separate portions of premises, the whole of which were held at an entire rent under one lease, the plaintiff having been compelled to pay the whole rent under threat of dis-

The common Indebitatus Count for Money received (a).

Money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

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tress, was held not entitled to recover a portion from the defendant as money paid to his use. (*Hunter* v. *Hunt*, 1 C. B. 300.)

Where, however, the defendant is not liable to any one but the plaintiff, so that the payment by the plaintiff does not exonerate the defendant from any liability, the plaintiff, having been compelled to pay, must sue the defendant specially on the contract between them. As where a tenant had agreed with his landlord to pay certain taxes for which the latter only was liable, but having failed to pay them, the landlord was compelled to do so, the landlord could not sue for money paid. (*Spencer* v. *Parry*, 3 A. & E. 331; and see *Lubbock* v. *Tribe*, 3 M. & W. 607.)

Money paid by the plaintiff, against the payment of which the defendant had agreed to indemnify him, may in general be recovered in this form of action (*Lewis* v. *Campbell*, 8 C. B. 541); as where the plaintiff defended an action upon an accommodation acceptance at the request of the defendant, for whose accommodation the plaintiff had given the acceptance, the plaintiff was allowed to recover the costs of the action as money paid to the defendant's use. (*Garrard* v. *Cottrell*, 10 Q. B. 679; and see *Sleigh* v. *Sleigh*, 5 Ex. 514.)

The defendant cannot avoid the effect of his request by showing that the payment was made in execution of a void contract, as on account of a wager lost by him (*Jessopp* v. *Lutwyche*, 10 Ex. 614; *Knight* v. *Cambers*, 15 C. B. 562); but he may avoid it by showing that the payment was made in execution of an illegal contract, as a stock-jobbing contract, formerly forbidden by 7 Geo. II. c. 8. (Ib.; *Mortimer* v. *Gell*, 4 C. B. 543.)

(*a*) *Money received.*]—This is the most comprehensive of all the common counts. It is applicable wherever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff. (per Lord Mansfield, *Moses* v. *Macferlan*, 2 Burr. 1005, 1110; and see *Marriot* v. *Hampton*, 2 Smith's L. C. 5th ed. 356; and *Owen* v. *Challis*, 6 C. B. 115.)

The claim must be for money; but if anything has been received by the defendant as money for the use of the plaintiff, it may be so treated by the plaintiff; as a check upon a banker (*Pratt* v. *Hobhouse*, 4 Bing. 173), or country bank-notes. (*Pickard* v. *Bankes*, 13 East, 20; and see *Timmis* v. *Gibbins*, 21 L. J. Q. B. 403); or foreign money (*Ehrensperger* v. *Anderson*, 3 Ex. 148); money allowed in a settlement of account, by a set-off of mutual debts, although no money actually passes, may be treated as money for this purpose. (*Standish* v. *Ross*, 3 Ex. 527; *Gingell* v. *Purkins*, 4 Ex. 720.)

The money must belong to the plaintiff (*Scarfe* v. *Hallifax*, 7 M. & W. 288); or must be received or held by the defendant as belonging to the plaintiff, *i. e.* to the use of the plaintiff. (*Kelly* v. *Curzon*, 4 A. & E. 622; *Clark* v. *Dignam*, 3 M. & W. 478; *Jones* v. *Carter*, 8 Q. B. 134.)

Money received to the use of the plaintiff's wife may be recovered as money received to the use of the plaintiff, although it was originally the wife's separate property in equity (*Sloper* v. *Cottrell*, 26 L. J. Q. B. 7; 6 E. & B. 497); nor would her equitable right form a sufficient ground for an equitable defence. (Ib.) So where a wife after marriage lent the defendant money which had been settled to her separate use, her husband was entitled to recover it in this form. (*Bird* v. *Peagrum*, 13 C. B. 639.)

One *tenant in common* cannot recover in this form of action against another who has received more than his share of the profits. (*Thomas* v. *Thomas*, 5 Ex. 28.)

Money received by the *sheriff* in execution of a writ of *fi. fa.*, may be recovered by the judgment creditor who sued out the writ as money received to his use (*Dale* v. *Birch*, 3 Camp. 347; *Longdill* v. *Jones*, 1 Stark. 345; and see *Jefferies* v. *Sheppard*, 3 B. & Ald. 696); so may the proceeds of the goods seized and sold (*Swain* v. *Morland*, 1 B. & B. 370); but the judgment creditor cannot thus recover the value of the goods seized before sale; nor can he recover the proceeds of the goods, where the sheriff has sold them under another writ, at the suit of a third party. (*Thurston* v. *Mills*, 16 East, 254.)

Upon the *assignment of a debt*, the amount may sometimes be recovered by the assignee against the debtor as money received to his use. The assignment of a debt cannot, in general, be effected so as to enable the assignee to sue the debtor at law in his own name; but by agreement of *all* the parties, upon sufficient consideration, new contracts may be created between them, which will be equivalent to an assignment of the debt; a sufficient consideration usually being found in the discharge of the debtor by the assignor and the new liability incurred by the debtor to the assignee. (*Israel* v. *Douglas*, 1 H. Bl. 239; *Tatlock* v. *Harris*, 3 T. R. 174, 180; *Fairlie* v. *Denton*, 8 B. & C. 395; *Cockrane* v. *Green*, 30 L. J. C. P. 97; 9 C. B. N. S. 448; *Liversidge* v. *Broadbent*, 4 H. & N. 603.)

Where the debt assigned was money received by the debtor to the use of the assignor, the assignment of the debt amounts to an assignment of the money to the assignee, and upon the assent of the debtor to the assignment, the money becomes received by him to the use of the assignee, who may recover it on this count (*Israel* v. *Douglas*, 1 H. Bl. 239; *Wilson* v. *Coupland*, 5 B. & Ald. 228; *Walker* v. *Rostron*, 9 M. & W. 411; *Noble* v. *National Discount Co.*, 29 L. J. Ex. 210; 5 H. & N. 225); but where the debt assigned was not a claim for money received, the debtor becomes liable to the assignee according to the special terms of the contract only by which he assents to the assignment (per Littledale, J., *Wharton* v. *Walker*, 4 B. and C. 163, 166); unless the nature of the transaction is such that the claim of the assignee can be treated as money received to his use. (See the above cases, and *Hudson* v. *Bilton*, 6 E. & B. 565.)

An order of a creditor on his debtor to pay the amount of the debt to a third person, followed by a promise by the latter to the holder of the order to pay him the amount, constitutes an effectual assignment of the debt; and the creditor cannot afterwards revoke the order, or recover against the debtor. (*Hodgson* v. *Anderson*, 3 B. & C. 842; *Crowfoot* v. *Gurney*, 9 Bing. 372; *Walker* v. *Rostron*, 9 M. & W. 411; *Hamilton* v. *Spottiswoode*, 4 Ex. 200; see, per Maule, J., *Partridge* v. *Bank of England*, 9 Q. B. 396, 413.) Upon mere presentment of the order to the debtor, he is justified in paying according to it, but until he has made such promise to pay it, he is not compelled to do so; in the meantime he remains liable to the original creditor, and is not liable to an action at the suit of the holder of the order. (See *Williams* v. *Everett*, 14 East, 582; *Wharton* v. *Walker*, 4 B. & C. 163; *Fairlie* v. *Denton*, 8 B. & C. 395; *Liversidge* v. *Broadbent*, 28 L. J. Ex. 332; 4 H. & N. 603; *Cockrane* v. *Green*, 30 L. J. C. P. 97.)

Where a creditor gives an order to his debtor to pay the debt to a third person upon a certain condition, and the debtor promises the latter to pay it accordingly, the assignee can have no claim against the debtor until the condition is fulfilled. (*Hudson* v. *Bilton*, 6 E. & B. 565.)

It should be noticed that an order by a creditor on his debtor to pay the whole or a part of his debt to another person, if made in writing and amounting to a bill of exchange, requires a stamp as such, and is not admissible in evidence without it. (*Pott* v. *Lomas*, 30 L. J. Ex. 210; 6 H. & N. 529.)

An *agent* receiving money rightfully for his principal is not liable to the owner, even where the principal upon receiving it would be bound to pay it over to the owner (*Stephens* v. *Badcock*, 3 B. & Ad. 354; *Bamford* v.

Shuttleworth, 11 A. & E. 926; *Barlow* v. *Browne*, 16 M. & W. 126; and see *Williams* v. *Deacon*, 4 Ex. 397); thus, where the defendant received rents under an authority given by two out of three executors, the three could not jointly recover it from him as money received to their use, although when paid over to the two it would be assets of the estate (*Heath* v. *Chilton*, 12 M. & W. 632); Money received by the defendant upon the authority of third persons for the purpose of paying it over to the plaintiff's creditors (as debts of a defaulter on the Stock Exchange collected by an official assignee of the Exchange) cannot be recovered as money received to the use of the plaintiff. (*Nicholson* v. *Gooch*, 25 L. J. Q. B. 137; 5 E. & B. 999.)

Where money has been received by an agent from his principal with instructions to pay it over to the plaintiff, the agent is not accountable in this action to the latter, until he has acknowledged to him that he has accepted the charge, and holds the money for his use. (*Williams* v. *Everett*, 14 East, 582; *Yates* v. *Bell*, 3 B. & A. 643; *Lilly* v. *Hays*, 5 A. & E. 548; *Brind* v. *Hampshire*, 1 M. & W. 365; *Baron* v. *Husband*, 4 B. & Ad. 612; *Moore* v. *Bushell*, 27 L. J. Ex. 3.) When such acknowledgment is given conditionally, the count will not lie until fulfilment of the condition. (*Malcolm* v. *Scott*, 5 Ex. 601; *Hudson* v. *Bilton*, 6 E. & B. 565; 26 L. J. Q. B. 27.)

An agent receiving money on account of his principal, and paying it over to the principal, without notice to the contrary, is protected against any claim which the party from whom it was received would have had if the money had still remained in his hands. (*Holland* v. *Russell*, 30 L. J. Q. B. 308.) As to the effect of the agent accounting with the principal for the money without actual payment, see Ib., and see *Buller* v. *Harrison*, Cowp. 565; *Cox* v. *Prentice*, 3 M. & S. 344.

An agent whose duty it is to receive money for, and render accounts to his principal is, in general, estopped from denying the accuracy of the accounts so rendered; and cannot claim re-imbursement for sums erroneously stated in the accounts to have been received, unless he can show that the statements were made unintentionally and by mistake. (*Skyring* v. *Greenwood*, 4 B. & C. 281; *Shaw* v. *Picton*, 4 B. & C. 715.)

Where an agent receives money from his principal under a revocable authority to dispose of it in a particular manner, the principal, after revocation of the authority, may recover the money as money received to his use. (*Taylor* v. *Lendey*, 9 East, 49; *Parry* v. *Roberts*, 3 A. & E. 118; *Fletcher* v. *Marshall*, 15 M. & W. 755.) But so long as the authority remains unrevoked, the principal must sue in a special count for any breach of the instructions by the agent. (*Ehrensperger* v. *Anderson*, 3 Ex. 148; and see *Miller* v. *Atlee*, 3 Ex. 799, 801; *Hardman* v. *Bellhouse*, 9 M. & W. 596; *Hill* v. *Smith*, 12 M. & W. 618.) Unless such breach amounts to a repudiation of the agency, or a total refusal by the agent to dispose of the money according to his instructions, in which cases the principal may also recover back the money under this count. (*Scott* v. *Surman*, Willes, 400, 404; *Thorpe* v. *Thorpe*, 3 B. & Ad. 580; *Buchanan* v. *Findlay*, 9 B. & C. 738; *Ehrensperger* v. *Anderson*, 3 Ex. 148, 158.) It should be noticed that by suing in a special count instead of in a count for money received, the principal may sometimes avoid a plea of set-off. (*Buchanan* v. *Findlay*, *supra*; *Thorpe* v. *Thorpe*, *supra*; *Colson* v. *Welch*, 1 Esp. 379; *Hill* v. *Smith*, 12 M. & W. 618. And see *post*, "*Set-off*.")

A *trustee* who has received trust-money is accountable for it to the *cestui que* trust in the Court of Chancery, but in the courts of law he is treated for most purposes as the absolute owner, and no action can in general be maintained by the *cestui que* trust against him to recover trust money. (*Pardoe* v. *Price*, 16 M. & W. 451; *Phillips* v. *Hewston*, 25 L. J. Ex. 133; 11 Ex. 699.) If, however, he admits to the *cestui que* trust that he holds such money as the money of the *cestui que* trust to be accounted,

for to the latter, he is debarred from setting up his character of trustee, and becomes liable at law to the *cestui que* trust for money received to his use. (*Remon* v. *Hayward*, 2 A. & E. 666; *Roper* v. *Holland*, 3 A. & E. 99; per Lord Campbell, C.J., *Edwards* v. *Lowndes*, 1 E. & B. 89; per Erle, J., *London and North Western Railway Company* v. *Glyn*, 28 L. J. Q. B. 188, 192.)

Thus a *husband* cannot recover the separate property of his *wife* in the hands of a trustee; but as soon as the trustee has paid it to an agent for her, he may recover it as money received to his use. (*Bird* v. *Peagrum*, 13 C. B. 639; *Sloper* v. *Cottrell*, 26 L. J. Q. B. 7; 6 E. & B. 497.) Nor would it even constitute a defence upon equitable grounds, that the money was originally the separate property of the wife. (Ib.)

An *executor* or *administrator* is in the position of a trustee, and the legacies or distributive shares payable out of the estate of the deceased, cannot be recovered at law as debts. (*Deeks* v. *Strutt*, 5 T. R. 690; *Jones* v. *Tanner*, 7 B. & C. 542; and see 2 Wms. Ex. 5th ed. 1746.) But after an executor has admitted to the legatee that he has received the money and holds it to his use, the legatee may recover it in this action. (*Topham* v. *Morecraft*, 8 E. & B. 972.) The County Courts, however, have jurisdiction for the recovery of any demand, not exceeding £50, which is the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will (9 & 10 Vict. c. 95, s. 65); and see *post*, "*Executors.*"

When the plaintiff's *money* has been *wrongfully obtained* by the defendant, the plaintiff may waive the wrong and claim it as money received to his use. (See *Hambly* v. *Trott*, 1 Cowp. 371, 376; *Lindon* v. *Hooper*, 1 Cowp. 414, 419.) Thus, where the defendant took away the plaintiff's money under a mistaken claim, it was held that the plaintiff might waive the wrong, and recover it as money received to his use. (*Neate* v. *Harding*, 6 Ex. 349; per Parke, B., *Atlee* v. *Backhouse*, 3 M. & W. 633, 640.) So, where the defendant obtained money from the plaintiff by fraudulent misrepresentation. (*Holt* v. *Ely*, 1 E. & B. 795; and see *Edmeads* v. *Newman*, 1 B. & C. 418.) Where the defendant has obtained the money from the plaintiff by a fraudulent contract, the plaintiff may disaffirm the contract and recover the money as money received to his use; as where the defendant obtained the money under a sale with a fraudulent warranty. (*Street* v. *Blay*, 2 B. & Ad. 456; *Gompertz* v. *Denton*, 1 C. & M. 207; and see *Hogan* v. *Shee*, 2 Esp. 522; *Thornett* v. *Haines*, 15 M. & W. 367; *Campbell* v. *Fleming*, 1 A. & E. 40.) And where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered in this count. (*Litt* v. *Martindale*, 18 C. B. 314.) So, where defendant wrongfully obtained from the plaintiff's debtors the payment of their debts under a fraudulent misrepresentation that he had an authority to collect them, the plaintiff was held entitled to recover the amount under this count. (*Andrews* v. *Hawley*, 26 L. J. Ex. 323.) And where money of the plaintiff has been wrongfully paid by a third party to the defendant, it may sometimes be recovered under this count; as where the wife of the plaintiff deposited her husband's money with a banker to the account of another, the plaintiff was held entitled to recover it from the banker in this count. (*Calland* v. *Loyd*, 6 M. & W. 26.) But where the defendant has received the plaintiff's money from a third party, *bonâ fide*, and under a binding contract, he is not accountable for it to the plaintiff. (Ib.; and see, per Parke, B., *Atlee* v. *Backhouse*, 3 M. & W. 633, 640, 648; and *Symonds* v. *Atkinson*, 25 L. J. Ex. 313; 1 H. & N. 146.)

Where the defendant has received *fees* pertaining to an office, asserting his right to the fees or to the office, the plaintiff really entitled to the office and the fees, may recover the amount actually received, as money had and received to his use. (*Spry* v. *Emperor*, 6 M. & W. 639; *King* v. *Alston*, 12 Q. B. 971; *Aulton* v. *Roberts*, 26 L. J. Ex. 380; 2 H. & N. 432; *Pinder* v. *Barr*, 4 E. & B. 105.)

Where the plaintiff's *goods* have been *wrongfully obtained* by the defendant and converted into money, the plaintiff may waive the wrong and follow the proceeds, claiming it as money received to his use. (*Lamine* v. *Dorrell*, 2 L. Raym., 1216; *Oughton* v. *Seppings*, 1 B. & Ad. 241.) Thus where the plaintiff's stock was sold by a member of the defendant's firm under a forged power of attorney and the price paid to the firm, the plaintiff recovered it under this count. (*Marsh* v. *Keating*, 1 Bing. N. C. 198.) Where the defendant fraudulently induced the plaintiff to sell goods to a third party who could not pay for them, for the purpose of the latter reselling them and paying the proceeds to the defendant, the defendant was held liable for the proceeds of the sale as money received to the plaintiff's use. (*Abbotts* v. *Barry*, 2 B. & B. 369.) Where a sheriff took in execution goods of a bankrupt, which had vested in the assignees by reason of a previous act of bankruptcy, and sold them after notice of the act of bankruptcy, the assignees were held entitled to recover the price as money received to their use. (*Balme* v. *Hutton*, 9 Bing. 471; *Garland* v. *Carlisle*, 4 Bing. N. C. 7; and see 12 & 13 Vict. c. 106, s. 133.) The value of the goods after the seizure, but before sale, could not be recovered under this count (see *Thurston* v, *Mills*, 16 East, 254; *Swain* v. *Morland*, 1 B. & B. 370); but where they were taken by the judgment creditor under a bill of sale from the sheriff for a certain sum after an act of bankruptcy, the assignees were held entitled to recover in this count, though no money actually passed. (*Reed* v. *James*, 1 Stark. 134.)

In the above cases, where the plaintiff is entitled to waive the wrongful character of the transaction, in order to claim his money or the proceeds of his goods which have been wrongfully obtained, by so doing he precludes himself from claiming any damages for the wrong done. Thus he cannot claim the proceeds of goods wrongfully sold by the defendant as a debt, and also claim damages in respect of the injurious nature of the act. (*Brewer* v. *Sparrow*, 7 B. & C. 310; and see *Valpy* v. *Sanders*, 5 C. B. 886.) Nor can he waive the wrong in part only; so that, having accepted from the defendant part of the price of goods which had been wrongfully sold by the latter, he is bound to treat the balance also as a debt. (*Lythgoe* v. *Vernon*, 29 L. J. Ex. 164; 5 H. & N. 180.)

Money paid by the plaintiff *without consideration*, or for a consideration that has failed, may be thus recovered (see *Straton* v. *Rastall*, 2 T. R. 366, 369, 370); as, money given for worthless foreign bonds (*Young* v. *Cole*, 3 Bing. N. C. 724); for forged railway scrip (*Westropp* v. *Solomon*, 8 C. B. 345); for a forged bank-note or worthless check (*Turner* v. *Stones*, 1 D. & L. 122; *Woodland* v. *Fear*, 26 L. J. Q. B. 202; 7 E. & B. 519); for a forged bill (*Jones* v. *Ryde*, 5 Taunt. 488; *Gurney* v. *Womersley*, 4 E. & B. 133; as to money paid in discharge of a forged bill see *Wilkinson* v. *Johnston*, 3 B. & C. 428); or money paid as deposit on a contract of sale which has been rescinded (*Fitt* v. *Cassanet*, 4 M. & G. 898; *Blackburn* v. *Smith*, 2 Ex. 783; *Ashworth* v. *Mounsey*, 9 Ex. 175; *Simmons* v. *Heseltine*, 28 L. J. C. P. 129); or which has been defeated by a condition (*Giles* v. *Edwards*, 7 T. R. 181; *Wright* v. *Newton*, 2 C. M. & R. 124; and see *Beavan* v. *M'Donnell*, 9 Ex. 309, where by the terms of the contract the deposit became forfeited); or money paid as deposits on scrip for shares in a railway scheme which turns out abortive (*Moore* v. *Garwood*, 4 Ex. 681; *Watson* v. *Earl Charlemont*, 12 Q. B. 856; *Ward* v. *Londesborough*, 12 C. B. 252; *Mowatt* v. *Londesborough*, 4 E. & B. 1; *Walstab* v. *Spottiswoode*, 15 M. & W. 501); or deposits on shares in an abortive cost-book mine (*Johnson* v. *Goslett*, 25 L. J. C. P. 274; S. C. on appeal, 27 L. J. C. P. 122; 3 C. B. N. S. 569); or the price of an annuity the securities for which have been set aside (*Huggins* v. *Coates*, 5 Q. B. 432); or the price of an annuity which had ceased to exist before the sale (*Strickland* v. *Turner*, 7 Ex. 208); so, the conduct money paid with a subpœna to a witness whose attendance was countermanded, and who incurred no expense (*Martin* v.

Andrews, 26 L. J. Q. B. 39; 7 E. & B. 1); so, money paid for a purpose which afterwards became impossible (*Brown* v. *Overbury*, 25 L. J. Ex. 169; 11 Ex. 715).

The plaintiff cannot recover as upon a failure of consideration where he has obtained that which he bargained for, although it turns out not genuine and valueless. (*Lamert* v. *Heath*, 15 M. & W. 486.) As money paid for the use of a patent, which is afterwards discovered to be invalid (*Taylor* v. *Hare*, 1 B. & P. N. R. 260; and see *Lawes* v. *Purser*, 26 L. J. Q. B. 25); or where the consideration fails partly through his own default (*Straton* v. *Rastall*, 2 T. R. 366; *Stray* v. *Russell*, 28 L. J. Q. B. 279); as where the plaintiff purchased shares in a bank, but did not get them registered, and the bank afterwards failed. (Ib.) The plaintiff cannot recover money paid to defendant under a contract which he cannot enforce for want of evidence to satisfy the Statute of Frauds. (*Sweet* v. *Lee*, 3 M. & G. 452.)

The failure of consideration must be complete in order to entitle the plaintiff to recover the money paid for it (*Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Ex. 783; *Nicholson* v. *Ricketts*, 29 L. J. Q. B. 55); but where the consideration is severable, complete failure of part may form a ground for recovering a proportionate part of the money paid for it (see *Hirst* v. *Tolson*, 19 L. J. C. 441; *Astle* v. *Wright*, 25 L. J. C. 864); as where a quantity of goods were ordered at a certain rate of payment, and only a portion was delivered. (*Devaux* v. *Conolly*, 8 C. B. 640.)

Money paid by the plaintiff to get rid of *duress* to the *person*, or even to the *goods* of the plaintiff, may be recovered under this count (*Astley* v. *Reynolds*, 2 Str. 915; *Shaw* v. *Woodcock*, 7 B. & C. 73; *Skeate* v. *Beale*, 11 A. & E. 983; *Atlee* v. *Backhouse*, 3 M. & W. 633; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Oates* v. *Hudson*, 6 Ex. 346; though, in order to avoid a contract by reason of duress, it must be duress of his person and not of his goods. Ib.) Money paid by a mortgagor to a mortgagee beyond what is justly due to prevent a threatened sale (*Close* v. *Phipps*, 7 M. & G. 586); or to obtain a transfer or assignment of the mortgage (*Fraser* v. *Pendlebury*, 31 L. J. C. P. 1) may be thus recovered; so also money exacted by other kinds of extortion or oppression (*Smith* v. *Cuff*, 6 M. & S. 160; *Valpy* v. *Manley*, 1 C. B. 594; *Smith* v. *Sleap*, 12 M. & W. 585; *Smith* v. *Bromley*, 2 Doug. 696, *n*; *Williams* v. *Hedley*, 8 East, 378); as by abuse of legal process (*Duke de Cadaval* v. *Collins*, 4 A. & E. 858; and see *Pitt* v. *Coomes*, 2 A. & E. 459; *Payne* v. *Chapman*, 4 A. & E. 364). But see as to cases of payments under distress, *Lindon* v. *Hooper*, 1 Cowp. 414; *Skeate* v. *Beale*, 11 A. & E. 983, 991; *Gulliver* v. *Cosens*, 1 C. B. 788; *Glyn* v. *Thomas*, 25 L. J. Ex. 125; 11 Ex. 870.

This count will lie for money paid by the plaintiff in discharge of a demand illegally made under colour of an office (*Morgan* v. *Palmer*, 2 B. & C. 729; *Steele* v. *Williams*, 8 Ex. 625); as excessive fees paid to the steward of a manor for admission to copyholds (*Traherne* v. *Gardner*, 25 L. J. Q. B. 201; 5 E. & B. 913); excessive fees paid to a broker under a distress (*Hills* v. *Street*, 5 Bing. 37); overcharges paid to a carrier to induce him to carry goods (*Piddington* v. *S. E. Ry. Co.*, 27 L. J. C. P. 295; *Ashmole* v. *Wainwright*, 2 Q. B. 837; *Parker* v. *Great Western Ry. Co.*, 7 M. & G. 253; *Garton* v. *Bristol and Exeter Ry. Co.*, 28 L. J. Ex. 169; 4 H. & N. 33; *Baxendale* v. *Eastern Co. Ry. Co.*, 4 C. B. N. S. 63); an excessive charge paid to an arbitrator to take up an award (*re Coombs*, 4 Ex. 839; *Barnes* v. *Braithwaite*, 2 H. & N. 569); money improperly exacted as a toll at a turnpike (*Waterhouse* v. *Keen*, 4 B. & C. 200; and see *Lewis* v. *Hammond*, 2 B. & Ald. 206).

This count will lie for money paid by the plaintiff under protest upon a disputed claim, if the claim turns out unfounded. (*Gibbs* v. *Gray*, 26 L. J. Ex. 286; 2 H. & N. 22; *Gibbs* v. *Charleton*, 26 L. J. Ex. 321.) But money recovered in an action which the defendant might have successfully defended cannot be recovered back. (*Marriott* v. *Hampton*, 7 T. R. 269;

2 Smith's L. C. 5th Ed. 356; *Hamlet* v. *Richardson*, 9 Bing. 644; *Duke de Cadaval* v. *Collins*, 4 A. & E. 858; *De Medina* v. *Grove*, 10 Q. B. 152.) And money paid voluntarily and with a full knowledge of all the facts, to satisfy a claim which the plaintiff could have successfully resisted cannot be afterwards recovered. (*Spragg* v. *Hammond*, 2 B. & B. 59; *Wilson* v. *Ray*, 10 A. & E. 82; *Barber* v. *Pott*, 28 L. J. Ex. 381; 4 H. & N. 759.)

Upon like grounds this action lies to recover money paid by reason of ignorance or *mistake of fact*, or by reason of an excusable forgetfulness of fact (*Bize* v. *Dickason*, 1 T. R. 285; *Milnes* v. *Duncan*, 6 B. & C. 671; *Kelly* v. *Solari*, 9 M. & W. 54; *Mills* v. *Alderbury Union*, 3 Ex. 590; *Aiken* v. *Short*, 25 L. J. Ex. 321; 1 H. & N. 210); as where a tenant *pur autre vie* paid rent in ignorance that the life had dropped. (*Barber* v. *Brown*, 26 L. J. C. P. 41; 1 C. B..N. S. 121.) Where one partner purchased another's share in the partnership, for a price dependent upon the amount of the profits, and paid the other more than he was entitled to under a mistake in a calculation of the profits. (*Townsend* v. *Crowdy*, 29 L. J. C. P. 300; 8 C. B. N. S. 477.)

A sheriff who has seized goods in execution and paid over the proceeds to the judgment creditor in ignorance of the fact of a previous act of bankruptcy of the judgment debtor, and has been subsequently compelled to pay the amount to the assignees of the bankrupt, may recover the proceeds paid to the judgment creditor as money received to his use. (*Brydges* v. *Walford*, 6 M. & S. 42; *Standish* v. *Ross*, 3 Ex. 527.)

But money paid in ignorance or *mistake of law* cannot be recovered. (*Bilbie* v. *Lumley*, 2 East, 469; *Stevens* v. *Lynch*, 12 East, 38; and see the above cases.) Where a tenant, having paid the landlord's property tax, afterwards paid his rent in full to the landlord, he was held not entitled to recover the amount of the tax. (*Denby* v. *Moore*, 1 B. & Ald. 123; and see *Spragg* v. *Hammond*, 2 B. & B. 59.) Money paid under a contract void by the Statute of Frauds cannot be recovered back. (*Sweet* v. *Lee*, 3 M. & G. 452.)

Where the plaintiff has paid money to the defendant upon an *illegal executory contract*, or for a future *illegal object*, he may at any time before the contract is executed or the event happens, claim the money back under this count. (Per Buller, J., *Lowry* v. *Bourdieu*, Doug. 470; *Jaques* v. *Withy*, 1 H. Bl. 65; *Taylor* v. *Lendey*, 9 East, 49; *Tappenden* v. *Randall*, 2 B. & P. 467; *Bone* v. *Ekless*, 29 L. J. Ex. 438; 5 H. & N. 925.) Money deposited with a stakeholder upon a wager may be reclaimed at any time before it is paid over according to the event. (*Gatty* v. *Field*, 9 Q. B. 431; *Martin* v. *Hewson*, 10 Ex. 737; *Varney* v. *Hickman*, 5 C. B. 271; *Hastelow* v. *Jackson*, 8 B. & C. 221; *Hodson* v. *Terrill*, 1 C. & M. 797.) But see *Mearing* v. *Hellings*, 14 M. & W. 711, suggesting that the right to reclaim after the event has happened might not be admitted by a court of error.

After the illegal purpose has been executed, or where the plaintiff has paid the money in execution of an illegal purpose or under an illegal agreement, the money cannot be reclaimed. (*Lowry* v. *Bourdieu*, Doug. 470; *Andree* v. *Fletcher*, 3 T. R. 266; *Thistlewood* v. *Cracroft*, 1 M. & S. 500; *Wilson* v. *Ray*, 10 A. & E. 82; *Viner* v. *Hawkins*, 9 Ex. 266.) But when the plaintiff, having paid money as the consideration of an illegal contract or for an illegal purpose, is not *in pari delicto*, he may in some cases recover it; as where the money was paid under oppression, as money paid by a bankrupt to obtain his certificate (*Smith* v. *Bromley*, 2 Doug. 596 *n*); money paid by the defendant in a penal action to compound the action. (*Williams* v. *Hedley*, 8 East, 378.) So money paid by an insolvent to one of his creditors to induce him to sign a composition deed is recoverable. (*Atkinson* v. *Denby*, 30 L. J. Ex. 361, Martin, B., *dissentiente*; and see *Higgins* v. *Pitt*, 4 Ex. 312.)

Although the plaintiff cannot enforce an illegal contract, yet if money has been paid to his agent in execution of an illegal contract, the plaintiff may

The Common Indebitatus Count for Interest (a).

Money payable by the defendant to the plaintiff for interest upon

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recover it as money received to his use. (*Tenant* v. *Elliott*, 1 B. & P. 3; *Farmer* v. *Russell*, 1 B. & P. 296; *Bousfield* v. *Wilson*, 16 M. & W. 185; *Nicholson* v. *Gooch*, 25 L. J. Q. B. 137; 5 E. & B. 999.) Thus where two joined in a wager, which they won, and the whole amount was paid to one of them, the other was entitled to recover his share as money received to his use. (*Johnson* v. *Lansley*, 12 C. B. 468.)

(*a*) *Interest.*]—Interest may be payable as a debt according to the terms of the contract, express or implied; or it may be recoverable as damages for the detention of a debt, and this either at common law or under the 3 & 4 Will. IV. c. 42, s. 28. (*Cameron* v. *Smith*, 2 B. & Ald. 305; *Hudson* v. *Fawcett*, 7 M. & G. 348.)

By the common law, where the contract is silent as to interest, it is generally presumed not to be within the contemplation of the parties, and so cannot be claimed. (*Frith* v. *Leroux*, 2 T. R. 57; *De Havilland* v. *Bowerbank*, 1 Camp. 50; *Fruhling* v. *Schroeder*, 2 Bing. N. C. 77; *Rhodes* v. *Rhodes*, 29 L. J. C. 418.) It is allowable however upon mercantile securities by the custom of merchants; also by particular usages of trade, and by the particular course of dealing between the parties, which would be evidence of an implied agreement. (*Higgins* v. *Sargent*, 2 B. & C. 348; *Fruhling* v. *Schroeder*, 2 Bing. N. C. 77.)

Thus interest is allowed upon bills of exchange, promissory notes, and other written mercantile securities, as in the nature of damages. (*Ib.*; *Calton* v. *Bragg*, 15 East, 223.) So it has been allowed on the price of goods agreed to be paid for by a bill, although the bill was never given (*Farr* v. *Ward*, 3 M. & W. 25); so, on a guarantee for the payment of a bill (*Hare* v. *Rickards*, 7 Bing. 254); on a promise to pay by a note (*Davis* v. *Smyth*, 8 M. & W. 399); and on a loan of money secured by a bill. (*Denton* v. *Rodie*, 3 Camp. 493, 496.) As to the rate of interest on foreign bills, see *post*, "*Foreign Bills.*" By the course of dealing between the parties, even compound interest may be claimed. (*Eaton* v. *Bell*, 5 B. & Ald. 34.)

By the statute 3 & 4 Will. IV. c. 42, s. 28, it is enacted "that upon all debts or sums certain, payable at a certain time or otherwise, the jury may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." And by s. 29, the jury may give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of insurance. The claim under the statute is in the nature of damages, and must be assessed by the jury. (*Berrington* v. *Phillips*, 1 M. & W. 48.)

Where interest is claimable as damages, no express claim for it seems to be necessary in the declaration; but where it is claimed under a contract, the claim should be stated, and the common count is sufficient (*Herries* v. *Jamieson*, 5 T. R. 553; *Nordenstrom* v. *Pitt*, 13 M. & W. 723), unless the contract to pay it be by specialty. As to including interest in the claim in the conclusion of the declaration, see *ante*, p. 7.

Since the repeal of the usury laws by the 17 & 18 Vict. c. 90, any rate of interest agreed upon between the parties is lawful.

money due from the defendant to the plaintiff, and forborne at interest by the plaintiff to the defendant at his request.

The common Indebitatus Count upon Accounts stated (*a*).

Money payable by the defendant to the plaintiff for money found

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(*a*) *Accounts stated.*]—An account stated is an admission of a sum of money being due from the defendant to the plaintiff, and may be charged in the above count as a distinct cause of action. (2 Wms. Saund. 122 *c*; and see, per Lord Abinger, C. B., *Irving* v. *Veitch*, 3 M. & W. 90, 106.) The count lies upon an absolute acknowledgment made by the defendant to the plaintiff of a debt due from him to the plaintiff and payable at the time of action brought. (*Wayman* v. *Hilliard*, 7 Bing. 101; *Knowles* v. *Michel*, 13 East. 249; *Highmore* v. *Primrose*, 5 M. & S. 65; *Gough* v. *Findon*, 7 Ex. 48; *Lemere* v. *Elliott*, 30 L. J. Ex. 350; 6 H. & N. 656.)

An account stated alone does not extinguish or supersede or alter the previous debts respecting which it was stated. (*Fidgett* v. *Penny*, 1 C. M. & R. 108; *Smith* v. *Page*, 15 M. & W. 683; *Perry* v. *Attwood*, 25 L. J, Q. B. 408; 6 E. & B. 691.) But an account stated respecting debts on both sides may by agreement between the parties effect an extinction of the cross demands, and so operate as payment *pro tanto*. (*Ashby* v. *James*, 11 M. & W. 542; *Callander* v. *Howard*, 10 C. B. 290.)

An account stated alone is not conclusive between the parties, but the debts respecting which it was stated may be examined. Thus, the defendant may show that the account was stated by mistake; (see *Trueman* v. *Hurst*, 1 T. R. 40, 42; *Thomas* v. *Hawkes*, 8 M. & W. 140; *Perry* v. *Attwood*, 6 E. & B. 691;) that the account was stated respecting a debt not then due, as an I O U given as security for a prospective debt; (*Lemere* v. *Elliott*, 30 L. J. Ex. 350; 6 H. & N. 656;) that the account was stated respecting debts without consideration, or upon a consideration which has failed; (*Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C. B. 616;) or that the debts were upon an illegal consideration or for an illegal purpose. (*Rose* v. *Savory*, 2 Bing. N. C. 145.) But it is no defence that the account was stated respecting a debt due under a contract within the Statute of Frauds, of which there was no memorandum in writing. (*Cocking* v. *Ward*, 1 C. B. 858.)

The acknowledgment may be proved by writing, as by a bill of exchange or promissory note (*Wheatley* v. *Williams*, 1 M. & W. 533) properly stamped (*Green* v. *Davies*, 4 B. & C. 235), which is evidence of an account stated between immediate parties to the instrument, but not between remote parties (*Burmester* v. *Hogarth*, 11 M. & W. 97); or by an I O U., which is evidence of an account stated with the person to whom it is addressed (*Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C. B. 616); and if it bears no address, then with the holder, in the absence of evidence to the contrary (*Curtis* v. *Rickards*, 1 M & G. 46; *Fesenmayer* v. *Adcock*, 16 M. & W. 449); or the acknowledgment may be by oral statement. (*Newhall* v. *Holt*, 6 M. & W. 662.)

The acknowledgment must show either expressly or by sufficient reference that a sum certain is due, and must be made either to the plaintiff himself or to his agent. (*Hughes* v. *Thorpe*, 5 M. & W. 667; *Kirton* v. *Wood*, 1 M. & Rob. 253; *Lane* v. *Hill*, 21 L. J. Q. B. 318.) It is not sufficient if made to a stranger (*Breckon v. Smith*, 1 A. & E. 488; *Tucker* v. *Barrow*, 7 B. & C. 623), and it must be made by the defendant or by his agent. An arbitrator is not an agent, and a count on an account stated will not be supported by his award. (*Bates* v. *Townley*, 2 Ex. 152.)

An acknowledgment of a debt payable at a future time is evidence of an account stated, upon which the right of action does not commence until the time of payment has arrived, as a promissory note payable at some period

to be due from the defendant to the plaintiff on accounts stated between them.

Common Indebitatus Count, stating several considerations (a).

Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for goods bargained and sold by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for

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after date (*Wheatley* v. *Williams*, 1 M. & W. 533; *Fryer* v. *Roe*, 12 C. B. 437); or a note payable by instalments. (*Irving* v. *Veitch*, 3 M. & W. 90.) As to an acknowledgment of a debt payable upon a contingency, see *Baker* v. *Heard*, 5 Ex. 959.

This count will not lie upon an acknowledgment under seal, nor upon an acknowledgment of a debt due under a deed. (*Middleditch* v. *Ellis*, 2 Ex. 623; and see *ante*, p. 29; but see *Tilson* v. *Warwick Gas Co.*, 4 B. & C. 962.)

A subsequent account stated respecting the same matter is not of itself a defence to an action on a previous one. (*Fidgett* v. *Penny*, 1 C. M. & R. 108.)

Under a common count alleging "an account stated" only one occasion of accounting was allowed to be proved. (*Kennedy* v. *Withers*, 3 B. & Ad. 767.) The count should therefore be framed as above "on accounts stated." This form of declaring had become usual before the C. L. P. Act, 1852, and is now sanctioned by the form given in the schedule. It is usual to add this count to all the other money counts.

(*a*) *Common indebitatus count stating several considerations.*]—Several considerations may be alleged in the declaration in respect of a single debt, as in the above form. (*Webber* v. *Tivill*, 2 Wms. Saund. 121 n. (2); *Morse* v. *James*, 11 M. & W. 831); and in such cases they constitute but one count (*Gore* v. *Baker*, 4 E. & B. 470), and should be so treated in pleading, unless the words "money payable" are repeated.

Before the C. L. P. Act, 1852, it was generally the practice in accordance with the forms given by the R. G. T. T. 1 Will. IV., to insert a specific sum of money at the commencement of each cause of debt; thus, "that the defendant was indebted to the plaintiff in £—— for goods sold and delivered by the defendant to the plaintiff, in £—— for goods bargained and sold," etc., and so on; and it was held, that where a specific sum was thus repeated before each of the several causes of debt, they constituted several counts; but where several considerations were stated in respect of a single sum, they formed but one count. (*Galway* v. *Rose*, 6 M. & W. 291; *Morse* v. *James*, 11 M. & W. 831; *M'Gregor* v. *Graves*, 3 Ex. 34; *Jourdain* v. *Johnson*, 2 C. M. & R. 564.)

The common count at present in use contains no such statement of a specific sum. The form is given in Sch. B. No. 1, of the C. L. P. Act, 1852, as follows: "Money payable by the defendant to the plaintiff for goods bargained and sold," etc. And it is there stated that the words "money payable" should precede money counts, but need only be inserted in the first. By treating the words "money payable" as equivalent to the mention of a specific sum in the old forms, the omission or repetition of them will mark the distinction between one and several counts.

The best and safest mode of declaring seems to be to unite all the considerations charged in one count, because distinct debts may still be proved in respect of the consideration thus charged; and if there is but one debt in respect of all the considerations jointly, it is the only proper mode of declaring.

money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for interest upon money due from the defendant to the plaintiff and forborne at interest by the plaintiff to the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them. [*Insert such considerations as are applicable.*]

Particulars of Demand (*a*).

In the ——.

Between *A. B.*, plaintiff, and *E. F.*, defendant.

The plaintiff seeks to recover in this action [*or, where there is a*

(*a*) *Particulars of demand, their effect on pleading.*]—By r. 19, H. T. 1853, "With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the Common Law Procedure Act, 1852, see *post*, p. 48 (*a*)) delivered or filed, containing causes of action such as those set forth in Schedule B. of that Act and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios." "And if any such declaration shall be delivered or filed, without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer." As to the special indorsement on the writ, see *post*, p. 48 (*a*).

By r. 13, T. T. 1853, "In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

"But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off, where the plaintiff does not state the particulars of such set-off."

According to the above rule, particulars of demand are required to be delivered with a declaration containing any indebitatus count, unless they have been already given in the special indorsement on the writ.

Where the cause of action in a special count is not sufficiently disclosed, the court may, upon application of the defendant, make an order for the plaintiff to deliver particulars. (2 Chit. Pr. 11th ed. 1439; *Jones* v. *Lee*, 25 L. J. Ex. 241.) If the declaration points out the cause of action with sufficient certainty, particulars will not be necessary, except in certain actions in which they are required by statute; as in actions for the infringement of letters patent, where by the Patent Law Amendment Act, 1852, the plaintiff must deliver with his declaration particulars of the breaches complained of in the action, see *post*, c. 3, "*Patents*;" and in an action under Lord Campbell's Act for causing a person's death, the plaintiff must deliver with the declaration a full particular of the persons on whose behalf the action is brought, and of the nature of the claim, see *post*, c. 3,

special count, under the indebitatus counts in this action] £——

"*Executors.*" The court has power to order particulars in actions for wrongs; but it is not the practice to do so, unless sufficient cause is shown. (*Wicks* v. *Macnamara*, 27 L. J. Ex. 419; 3 H. & N. 568; *Horlock* v. *Lediard*, 10 M. & W. 677.)

If no particulars are delivered or ordered, the plaintiff may prove anything within the scope of his declaration. If the particulars delivered are not sufficiently explicit, the defendant should apply for an order for further and better particulars. (*Ibbett* v. *Leaver*, 16 M. & W. 770.)

The object of the particulars of demand is to control the generality of the declaration and to restrict the plaintiff at the trial, and to give the defendant such information as may enable him to frame his defence or pay money into court if necessary. (*Kenyon* v. *Wakes*, 2 M. & W. 767; *Rennie* v. *Beresford*, 15 M. & W. 83.) The effect, therefore, of the particulars is to restrict the plaintiff's demand both to the amount and to the items stated in his particulars. (*Holland* v. *Hopkins*, 2 B. & P. 243; *Hedley* v. *Bainbridge*, 3 Q. B. 316; *Roberts* v. *Elsworth*, 2 Dowl. N. S. 456.) Thus, under a particular specifying horses sold by the plaintiff to the defendant, the paintiff could not recover the price of horses sold by the defendant for the plaintiff as his agent. (*Holland* v. *Hopkins*, 2 B. & P. 243.) But if the matter of the transaction is stated at large, the plaintiff may recover upon any cause of action arising out of it which is alleged in the declaration. (*Brown* v. *Hodgson*, 4 Taunt. 189; *Gould* v. *Coombs*, 1 C. B. 543; *Simmons* v. *Wood*, 5 Q. B. 170.) Under a particular specifying a promissory note, plaintiff might recover upon the note as an account stated. (*Gould* v. *Coombs*, 1 C. B. 543.) Hence it is prudent for the plaintiff to state the items in as general terms as possible.

The particulars do not affect any counts in the declaration except those to which they refer, or restrict the plaintiff in inserting any special counts on which he may rely. New assignments, when pleaded, must be consistent with and are confined by the particulars delivered in the action. (C. L. P. Act, 1852, s. 87, and see *post*, "*New Assignment.*")

It is optional with the plaintiff to give credits for payments or matters of set-off in his particulars. (*Randall* v. *Ikey*, 4 Dowl. 682; *Penprase* v. *Crease*, 1 M. & W. 36; *Luck* v. *Handley*, 19 L. J. Ex. 29; *Fussell* v. *Gordon*, 13 C. B. 847.) And if he does give such credits, he is not compellable to give the items. (*Myatt* v. *Green*, 13 M. & W. 377.)

Where credits are given in the particulars, the plaintiff is considered as suing only for the balance claimed (*Russell* v. *Bell*, 10 M. & W. 352); so that if he proves no balance beyond what is credited, the defendant is entitled to a verdict. (*Smethurst* v. *Taylor*, 12 M. & W. 545.) The plea of payment or set-off is taken with reference to the balance claimed in the particulars (*Eastwick* v. *Harman*, 6 M. & W. 13); the proof under it must be of items other than those credited. The items proved would be *primâ facie* applicable to the balance, and it lies upon the plaintiff to show that they are identical with those already credited. (*Townson* v. *Jackson*, 13 M. & W. 374; *Lamb* v. *Micklethwait*, 1 Q. B. 400.)

A copy of the particulars is annexed to the record, but they do not form part of the record for all purposes of pleading (*Jubb* v. *Ellis*, 3 D. & L. 367); thus the plea of payment or payment into court admits *pro tanto* the causes of action in the declaration, but does not admit those stated in the items of the particulars. (*Booth* v. *Howard*, 5 Dowl. 438; *Meager* v. *Smith*, 4 B. & Ad. 673.) But a plea of payment of a smaller sum in satisfaction of a larger debt claimed in the declaration, though bad *per se*, was held good upon a motion for judgment *non obstante veredicto*, on the ground that the particulars might, by giving credit, have restricted the debt appearing upon the record. (*Turner* v. *Collins*, 2 L. M. & P. 99; 20 L. J. Q. B. 259.)

due [*or*, being the balance due] to the plaintiff on the following account:—

To [*here state the debit side of the account*] . . £——

Cr.

By [*here state the credit side in respect of payments and set-off, if any*] . . . . . £——

Balance due . . . £——

And the plaintiff also seeks to recover £——, on accounts stated.

Above are the particulars of the plaintiff's demand herein [*or* under the indebitatus counts herein].

Dated the —— day of ——, ——.

Yours, etc.,

C. D., plaintiff's attorney [*or* agent].

To *Mr. G. H.*, defendant's attorney or agent.

[*When the particulars of the claim cannot be comprised within three folios, the debt may be stated thus:* £—— due to the plaintiff for (*describing the subject-matter generally, as*) wheat sold and delivered by the plaintiff to the defendant (*or* money paid by the plaintiff for the defendant at his request) on and between the —— day of ——, 186–, and the —— day of ——, 186–, full particulars whereof cannot be comprised within three folios. The plaintiff also seeks to recover £—— on accounts stated.]

See other forms of particulars of demand, Chit. Forms, 8th ed. 790.

Forms of particulars of demand for the special indorsement of writs. (See C. L. P. Act, 1852, Sch. A., No. 4.) (*a*)

(*a*) *Special indorsement on the writ.*] The C. L. P. Act, 1852, s. 25, provides that "in all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim, in the form contained in the schedule (A) to this Act annexed, marked No. 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the court or a judge."

It may happen that the particulars indorsed on the writ are afterwards found to be incorrect or insufficient, and it may become necessary to amend them. This can generally be done only by leave of the court or a judge; but if the defect is discovered before declaring, it is not unusual in practice to deliver new particulars with the declaration. These, if not set aside for irregularity, would be taken to supersede the particulars indorsed on the writ, and may be used at the trial. (*Fromant* v. *Ashley*, 1 E. & B. 723.) An application to set them aside could rarely be attended with advantage, and the irregularity is, of course, waived by the defendant proceeding. The effect of the particulars is only to restrict the declaration as to claims under the indebitatus counts and such counts as they may be applicable to; but

Special Counts in Actions on Contracts (*a*).

Account (*b*).

Count against a bailiff for not rendering a reasonable account of the annual profits of land during a certain period: Wheeler v. *Horne*, Willes, 208.

Counts by a tenant in common of land against his co-tenant for not rendering a reasonable account of the profits, under the 4 Anne, c. 16:

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the plaintiff may insert in his declaration any special counts to which his indorsement is not applicable, and these will not be affected by the indorsement.

(*a*) *Special counts in actions on contracts.*]—We have seen above, p. 28 *n*(*a*), that where a simple contract results in a money debt, and nothing remains to be done but to pay the amount, it may be sued for in form of an indebitatus count; and that in other cases the declaration must be special. These cases include various technical forms of action; as Debt, Assumpsit, Covenant, etc., and sometimes Case, according to the nature of the contract and cause of action. If the cause of action is a debt, the form of action is *Debt*, but the declaration must be framed specially upon the record, covenant, bond, bill, etc., under which it is due. If the contract is by deed, and the covenant is to do anything else than to pay a sum of money, the action will be in *covenant*. If the contract broken is a simple contract or promise, whether express or implied, to do anything else than to pay money, the action will be in *assumpsit*. And in some cases, arising out of contracts, where the relation existing between the parties is one which involves a common law duty, the same act or default may be considered either as a breach of the promise and be sued for in assumpsit, or as a breach of the duty, and be made the subject of a declaration framed in *case*. (See *post*, "*Carriers*," p. 101.)

Since the C. L. P. Act, 1852, has dispensed with the mention of the form of action in the writ, has allowed different forms of action to be joined, and has abolished special demurrers, the distinction between forms of action *ex contractu* is immaterial so far as regards the declaration. Any counts between the same parties and in the same rights may now be joined; and the form of each is governed immediately by the nature of the contract. It is sufficient if the cause of action is correctly stated and the contract so described as to avoid a variance at the trial. Thus, simple contracts are described by the words "agreed," "promised," or according to their more special character "guaranteed," "warranted," "bargained and sold," etc.; bills and notes, policies of insurance, etc., are particularly described; specialties are shown by the word "covenanted," or by alleging that the agreement was "by deed" or "bond;" and so of the rest. In those cases where assumpsit for a breach of promise and case for a breach of duty are concurrent remedies, the declaration in the former case alleges the consideration and promise, and in the latter, the retainer and employment on the particular terms. These distinctions in the forms of declarations sufficiently guide the defendant in pleading to the count, and enable him to plead non assumpsit, non est factum, not guilty, etc., according to the matter pleaded to. Under the present division will be found the various causes of action *ex contractu* arranged in alphabetical order, according to the subject-matter, and without reference to the technical forms of action. Forms of action framed in tort are, for the sake of convenience, classed under actions for wrongs. (See *post*, "*Counts in Actions for Wrongs*," ch. 3.)

(*b*) The above forms are in actions of account, a form of action now seldom adopted. This action lies by the common law against a bailiff or receiver,

Sturton v. *Richardson*, 13 M. & W. 17; *Eason* v. *Henderson*, 12 Q. B. 986; *Beer* v. *Beer*, 12 C. B. 60; *Gorely* v. *Gorely*, 1 H. & N. 144.

Count by a tenant in common of goods against another tenant in common, for not rendering a reasonable account of the produce of sales of the goods, and of the profits: Baxter v. *Hozier*, 5 Bing. N. C. 288.

See other forms for not accounting. "*Agents*," *infra*; "*Brokers*," *post*, p. 100.

ADMINISTRATORS.

See *post*, "*Executors*."

AGENT.

Indebitatus Count for Work, etc., done by an Agent (*a*).

Money payable by the defendant to the plaintiff for the work, journeys, and attendances of the plaintiff, by him done, performed, and bestowed as the agent of and for the defendant, and otherwise, for the defendant at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof.

Indebitatus count for work, etc., done by a parliamentary agent: Abbott v. *Rogers*, 16 C. B. 277; *Bulmer* v. *Gilman*, 4 M. & G. 108; *by a commission agent, Lockwood* v. *Levick*, 29 L. J. C. P. 340.

By an agent employed to buy goods and draw bills for the price, against his employer for not accepting a bill: Huntley v. *Sanderson*, 1 C. & M. 467.

By a factor employed to sell goods according to description against his employer for delivering goods not equal to the description, whereby the plaintiff was unable to fulfil his contract: Johnstone v. *Usborne*, 11 A. & E. 549.

By a clerical agent against his employer, for revoking his retainer

or against a merchant at the suit of a merchant in respect of dealings together as merchants, for not rendering a reasonable account of profits. (Bac. Ab. Account, and see the cases cited above.) It would not lie by the common law against a tenant in common of realty at the suit of his cotenant, unless he had been expressly appointed bailiff of the share of the latter. (*Wheeler* v. *Horne*, Willes, 208.) But by the statute 4 Anne, c. 16, s. 27, an action of account may be brought by one joint tenant or tenant in common against the other, as bailiff, for receiving more than comes to his just share or proportion.

(*a*) It would in general be sufficient for an agent to sue for his commission or the price of his services in the common count for work and labour, *ante*, p. 32, as under that count any description of work may be given in evidence. It is usual, however, to describe the exact character in which the work has been done, as by a *del credere* agent, by a parliamentary agent, by a broker, *post*, p. 99; by an attorney, *post*, p. 66, etc. In such cases it is prudent to add the words "and otherwise," in order that the plaintiff may not be restricted in his proof.

to sell an advowson: Simpson v. *Lamb*, 25 L. J. C. P. 113; 17 C. B. 603; *and see Prickett* v. *Badger*, 26 L. J. C. P. 33; 1 C. B. N. S. 96.

Against an Agent employed to sell Goods, for not accounting (a).

That in consideration that the plaintiff would employ the defendant as his agent to sell and dispose of certain goods for the plaintiff for reward to the defendant, the defendant promised the plaintiff to sell and dispose of the said goods for the plaintiff, and on request to render to the plaintiff a true and just account of the said goods and of the sale thereof, and of the moneys arising from such sale; and the plaintiff employed the defendant, and the defendant received and had the said goods, for the purpose and on the terms aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action for the breach hereinafter mentioned; yet the defendant did not render to the plaintiff a just or true or any other account of the said goods, or of the sale thereof, or of the moneys arising from such sale.

Like counts: Topham v. *Braddick*, 1 Taunt. 572; *Crosskey* v. *Mills*, 1 C. M. & R. 298.

Against an Agent, for selling Goods for a less Price than ordered.

That in consideration that the plaintiff would employ the defendant as his agent to sell certain goods for the plaintiff for reward to the defendant, the defendant promised the plaintiff to obey the lawful and reasonable orders of the plaintiff in respect of the sale of the said goods; and the plaintiff employed the defendant, and the defendant received and had the said goods for the purpose and on the terms aforesaid; and the plaintiff afterwards ordered the defendant as such agent not to sell the said goods at a price less than £—— (the same being a lawful and reasonable order in that behalf); yet the defendant sold the said goods at a less price than £——.

Against a corn-factor for selling wheat consigned to him at a less price than ordered: Smart v. *Sandars*, 3 C. B. 380.

Against an Agent, for selling Goods on Credit contrary to orders.

That in consideration that the plaintiff would employ the defendant as his agent to sell certain goods for the plaintiff for reward to the defendant, the defendant promised the plaintiff to sell the said goods for ready money and not otherwise; and the plaintiff employed the defendant, and the defendant received and had the said goods for the purpose and on the terms aforesaid; yet the defendant afterwards sold the said goods otherwise than for ready money, that is to say, on credit; whereby the plaintiff has hitherto been deprived of the price and value of the said goods, and is likely to lose the same.

Like counts: Earl Ferrers v. *Robins*, 2 C. M. & R. 152; *Boorman* v. *Brown*, 3 Q. B. 510.

(a) An action will not lie against an agent for merely omitting to perform a commission, unless he is bound by some contract or duty to undertake it; but if he does undertake it, though gratuitously, he is liable to an action for misfeasance in the performance. (*Elsee* v. *Gatward*, 5 T. R. 143; *Dartnall* v. *Howard*, 4 B. & C. 345; *Whitehead* v. *Greetham*, 2 Bing. 464; *Hart* v. *Miles*, 4 C. B. N. S. 371; 27 L. J. C. P. 218.)

Against an agent employed to purchase goods, for negligence in accepting goods not agreeing with the description in the contract: Zuilchenbart v. *Alexander*, 29 L. J. Q. B. 236; 30 L J. Q. B. 254.

Against an Agent, for not using due care and diligence in collecting Moneys.

That in consideration that the plaintiff would employ the defendant as his agent to collect certain moneys owing from divers persons to the plaintiff, for reward to the defendant, the defendant promised the plaintiff to use due care and diligence in endeavouring to collect the same for the plaintiff; and the plaintiff employed the defendant accordingly for the purpose and on the terms aforesaid, and a reasonable time for the performance of the said promise by the defendant elapsed; yet the defendant did not use due care or diligence in endeavouring to collect the said moneys for the plaintiff; whereby the plaintiff has hitherto been deprived of the use of the said moneys, and is likely to lose the same.

Against an agent employed to get bills discounted: Mullett v. *Huchison*, 7 B. & C. 639; *Alder* v. *Keighley*, 15 M. & W. 117.

Against an agent employed to discount bills, for not applying the proceeds according to his instructions: Hart v. *Miles*, 4 C. B. N. S. 371; 27 L. J. C. P. 218; *and see post, "Bills of Exchange,"* p. 95.

Against an agent employed to take up a bill, for neglecting to do so: see post, "Bills of Exchange," p. 95.

Against a del credere Agent on his Guarantee of Goods sold by him (a).

That in consideration that the plaintiff would employ the defendant, as his del credere agent, to sell and dispose of certain goods for the plaintiff, for reward to the defendant, the defendant promised the plaintiff to sell and dispose of the said goods for the plaintiff, and to be responsible to the plaintiff for the payment of the price of the same; and the plaintiff employed the defendant, and the defendant received and had the said goods for the purpose and on the terms aforesaid, and as such del credere agent sold and disposed of the said goods for the plaintiff, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to be paid the price of the said goods; yet the price of the said goods is still due and unpaid to the plaintiff.

Like counts stating the terms of the sale: Couturier v. *Hastie*, 8 Ex. 40; 9 Ex. 102; S. C. in H. L. 25 L. J. Ex. 253; *Tanvaco* v. *Lucas*, 28 L. J. Q. B. 150; 301.

Against a house agent employed to let a house upon a promise to take reasonable care that the person to whom he should let it should be a solvent person: Heys v. *Tindall*, 30 L. J. Q. B. 362.

(a) The agreement of a *del credere* agent is not in its immediate object a promise to answer for the debt of another within the 4th section of the Statute of Frauds, and therefore need not be in writing. (*Couturier* v. *Hastie*, 8 Ex. 40.)

Against an Agent on the implied Warranty that he had Authority to contract with the Plaintiff (a).

That in consideration that the plaintiff would enter into a contract with the defendant, as and assuming to be the agent of *G. H.*, for the sale by the plaintiff to the said *G. H.* of certain goods [*or state generally the nature of the contract*], the defendant promised the plaintiff that he was authorized by the said *G. H.* to make the said contract for him as his agent; and the plaintiff did enter into the said contract with the defendant, as and assuming to be the agent of the said *G. H.*, and was always ready and willing to perform the same on his part; yet the defendant was not authorized by the said *G. H.* to make the said contract for him as his agent; by reason whereof the plaintiff was not able to enforce the performance of the said contract, and the same was not performed, and the plaintiff lost the benefit thereof, and was put to expense in performing the said contract on his part, and incurred expense in endeavouring to enforce the performance of the said contract, and in unsuccessfully suing the said *G. H.* in an action at law for the non-performance thereof, and has been obliged [*or* become liable] to pay divers costs to the said *G. H.*

Like counts: Randell v. *Trimen*, 25 L. J. C. P. 307; 18 C. B. 786; *Simons* v. *Patchett*, 26 L. J. Q. B. 195; 7 E. & B. 568.

Count against an agent on a warranty that he had authority to let certain premises to the plaintiff, who was afterwards ejected therefrom by the owner: Pow v. *Davis*, 30 L. J. Q. B. 257.

See other counts respecting agents: "Attorney," p. 66; *"Auctioneer,"* p. 68; *"Broker,"* p. 99. *And forms in tort, post,* ch. 3, *"Agents."*

(*a*) This count must distinctly allege that the defendant had not the assumed authority. A count which merely alleged that the plaintiff was nonsuited in an action against the principal by reason of the defendant denying in that action that he had authority, was held bad on demurrer. (*Oxenham* v. *Smythe*, 31 L. J. Ex. 110.)

The measure of damages in this action is the loss which the plaintiff has sustained by reason of the supposed contract not being binding: thus, the contract being for the sale of a ship at a certain price which the plaintiff afterwards resold at a less price, the measure of damages was the difference in price. (*Simons* v. *Patchett*, 26 L. J. Q. B. 195; 7 E. & B. 568.)

The plaintiff is entitled to recover as special damage the costs of an unsuccessful action against the alleged principal on the contract (*Randell* v. *Trimen*, *supra*, and see *Richardson v. Dunn*, 30 L. J. C. P. 44), or of an unsuccessful suit for specific performance. (*Collen* v. *Wright*, 26 L. J. Q. B. 147; 27 L. J. Q. B. 215; 7 E. & B. 301.) The *liability* to pay such costs is sufficient to sustain the claim for special damage (*Randall* v. *Roper*, 27 L. J. Q. B. 266; *Spark* v. *Heslop*, 28 L. J. Q. B. 197; *Josling* v. *Irvine*, 30 L. J. Ex. 78), if properly charged in the declaration. (*Pritchet* v. *Boevey*, 1 C. & M. 775; *Richardson* v. *Chasen*, 10 Q. B. 756.) Where the contract made with the alleged principal is defective in form, the plaintiff cannot recover the costs of suing upon it; as where the plaintiff was let into possession of premises by the defendant under a supposed authority to let them, but upon a mere verbal agreement for a seven years' lease, and was afterwards sued in ejectment by the owner, he could not recover against the supposed agent the costs of defending the ejectment. (*Pow* v. *Davis*, 30 L. J. Q. B. 257.)

Agistment.

Indebitatus Count for the Agistment of Horses and Cattle.

Money payable by the defendant to the plaintiff for the agistment, feeding, and taking care of horses and cattle by the plaintiff for the defendant at his request.

Indebitatus Count for the Keep of Horses.

Money payable by the defendant to the plaintiff for horse-meat, medicine, stabling, care, skill, and attendance, by the plaintiff, provided and bestowed in feeding, keeping, and training horses and cattle for the defendant at his request.

Indebitatus Count for the Use of Pasture.

Money payable by the defendant to the plaintiff for the defendant's use by the plaintiff's permission of pasture land of the plaintiff, and the eatage of the grass growing thereon for the depasturing of cattle.

A like count: Sutton v. *Temple*, 12 M. & W. 52.

Against an Agister of Cattle for losing a Horse (*a*).

That in consideration that the plaintiff delivered to the defendant a horse of the plaintiff, to be agisted and safely kept and taken care of by the defendant for the plaintiff, for reward to the defendant, the defendant promised the plaintiff to agist and safely keep and take care of the said horse for the plaintiff; yet the defendant did not safely keep and take care of the said horse for the plaintiff; whereby the same was and is lost to the plaintiff.

Annuity.

On an Annuity Deed for Arrears.

That the defendant, by deed dated the —— day of ——, A.D. ——, granted to the plaintiff an annuity or yearly sum of £——, payable half-yearly on the —— day of ——, and the —— day of ——, in every year from the —— day of ——, A.D. ——, for and during the life of the plaintiff, and thereby covenanted with the plaintiff to pay the same to the plaintiff at the times and in the manner aforesaid; of which said annuity £——, being the amount of —— half-yearly payments thereof, is due and unpaid.

Like counts: Randall v. *Rigby*, 4 M. & W. 130; *Humphreys* v. *Jenkinson*, 8 Ex. 684; *Howkins* v. *Bennet*, 30 L. J. C. P. 193.

(*a*) The common law duty of an agister of cattle with whom cattle are left to be fed, is to safely keep and take care of them and feed them, and permit the owner to retake them, but not to re-deliver them to him. (*Broadwater* v. *Bolt*, Holt. N. P. C. 541; *Corbett* v. *Packington*, 6 B. & C. 268, 271.)

On a covenant in a deed of separation between husband and wife, to pay an annuity to the wife's trustee: Baynon v. *Batley*, 8 Bing. 256, *On an annuity bond, see post,* "*Bonds,*" p. 96.

Apprentice.

By the Apprentice against the Master, on the Indenture of Apprenticeship (*a*).

That by an indenture of apprenticeship, dated the —— day of ——, A.D. ——, the plaintiff put himself apprentice to the defendant, to learn the defendant's trade and business of a ——, and with him, after the manner of an apprentice, to serve from the —— day of ——, A.D. ——, for the term of —— years thence next following, and the defendant thereby covenanted with the plaintiff to instruct the plaintiff in his the defendant's said trade and business, by the best means that he could, and to provide for the plaintiff sufficient meat, drink, lodging, and all other necessaries, during the said term; and after the making of the said indenture, the plaintiff entered into the said service of the defendant, with him after the manner of an apprentice to serve for the term aforesaid, and has always performed all things in the said indenture contained on his part to be performed; yet the defendant, after the making of the said indenture and during the said term, did not nor would instruct the plaintiff in his the defendant's said trade and business, nor did nor would provide for the plaintiff sufficient meat, drink, lodging, and other necessaries. [*State the breach, according to the fact, in the terms of the covenant broken.*]

Like counts by the father of the apprentice: Winstone v. *Linn*, 1 B. & C. 460; *Hughes* v. *Humphreys*, 6 B. & C. 680; *Dunn* v. *Sayles*, 5 Q. B. 685; *Phillips* v. *Clift*, 28 L. J. Ex. 153; 4 H. & N. 168.

A like count after an assignment of the indenture against the new master: Morris v. *Cox*, 2 M. & G. 659.

By the Master against the Father of the Apprentice on the Indenture of Apprenticeship (*b*).

That by an indenture of apprenticeship, dated the —— day of

(*a*) The covenants in an indenture of apprenticeship are independent covenants; and therefore misconduct on the part of the apprentice is in general no defence to an action for a breach, on the part of the master, of the covenant to instruct and maintain the apprentice. (*Winstone* v. *Linn*, 1 B. & C. 460; *Phillips* v. *Clift*, 28 L. J. Ex. 153; 4 H. & N. 186.) But it is a good defence to an action for not teaching and providing for the apprentice, that he quitted the service without leave. (*Hughes* v. *Humphreys*, 6 B. & C. 680.) And it is a good defence to an action against the father for the desertion of the apprentice, that the master had abandoned one of three trades which he covenanted to teach. (*Ellen* v. *Topp*, 6 Ex. 424.)

As to the right to a return of the premium on the death of the master or apprentice, see *Therman* v. *Abell*, 2 Vern. 64; *Ex parte Prankerd*, 3 B. & Ald. 257; *In re Thompson*, 1 Ex. 864; *Hirst* v. *Tolson*, 19 L. J. C. 441.

The Court of Chancery has no peculiar jurisdiction to interfere between master and apprentice. (*Webb* v. *England*, 30 L. J. C. 222.)

(*b*) The form of covenant usually inserted in indentures of apprentice-

——, A.D. ——, and made between *G. B.*, therein described as the son of the defendant of the first part, the defendant of the second part, and the plaintiff of the third part, the said *G. B.*, with the consent of the defendant, put himself apprentice to the plaintiff to learn his trade and business of a ——, and with him after the manner of an apprentice to serve from the —— day of ——, A.D. ——, for the term of —— years thence next following, and the defendant thereby covenanted with the plaintiff amongst other things, that the said *G. B.* the plaintiff faithfully should serve, his secrets keep, his lawful commands obey and do, and that he should not absent himself from the plaintiff's service day or night unlawfully, but in all things as a faithful apprentice should behave himself towards the plaintiff and all his during the said term; and after the making of the said indenture the plaintiff received the said *G. B.* into the plaintiff's said service as such apprentice for the term aforesaid, and has always performed and been ready and willing to perform all things in the said indenture on his part to be performed; yet the said *G. B.*, after the making of the said indenture and during the said term, unlawfully absented himself from the service of the plaintiff. [*State the breach according to the fact in the terms of the covenant broken.*]

Like counts: Cuming v. *Hill*, 3 B. & Ald. 59; *Ellen* v. *Topp*, 6 Ex. 424; *Millership* v. *Brookes*, 5 H. & N., 797; *Cox* v. *Muncey*, 6 C. B. N. S. 375.

Count against a surety, a party to the indenture of apprenticeship, for nonpayment of the premium: Popham v. *Jones*, 13 C. B. 225.

Arbitration and Award (*a*).

Indebitatus Count on an Award.

Money payable by the defendant to the plaintiff for money awarded by *G. H.* to be paid by the defendant to the plaintiff, by an award of the said *G. H.*, made under a submission to his arbi-

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ship, "for the true performance of all and every the said covenants and agreements, each of the said parties bindeth himself unto the others by these presents," is held to render the father liable for the performance of the articles by the son. (*Whitley* v. *Loftus*, 8 Mod. 190; *Branch* v. *Ewington*, Doug. 518.) As to whether the apprentice, being a minor at the time of executing the indenture, can afterwards disaffirm his execution, see *R.* v. *Hindringham*, 6 T. R. 557. The father would still remain liable. (*Cuming* v. *Hill*, 3 B. & Ald. 59.)

(*a*) Where the submission to arbitration cannot be made a rule of court (a very unusual case since the C. L. P. Act, 1854, s. 17), the award can only be enforced by action. An award can, in general, be enforced either by action or by attachment, or, if it be an award to pay money, by execution under the 1 & 2 Vict. c. 110, s. 18. The latter are the more speedy and convenient remedies; but if there be any doubt about the validity of the award, the court will not interfere to give these summary remedies, and the party will be left to an action. (2 Chit. Pr. 10th ed. 1621.)

On an award for the payment of money the indebitatus count is sufficient;

tration by the plaintiff and defendant, of matters in difference between them.

A like count: Sim v. *Edmonds*, 15 C. B. 240.

Indebitatus Count on an Umpirage.

Money payable by the defendant to the plaintiff for money awarded by *G. H.* to be paid by the defendant to the plaintiff, by an umpirage of the said *G. H.*, duly appointed an umpire in that behalf by *K. L.* and *M. N.*, under a submission by the plaintiff and the defendant of matters in difference between them to the arbitration of the said *K. L.* and *M. N.*, or of an umpire to be appointed by them in that behalf, in case they should disagree in making an award, as in fact they did.

Indebitatus Count for the Costs of an Action and Reference due under an Award.

Money payable by the defendant to the plaintiff for the costs, duly taxed and allowed to the plaintiff, of a certain action, and of a reference and award in respect thereof, awarded by *G. H.* to be paid by the defendant to the plaintiff, by an award of the said *G H.*, made under a submission to his arbitration by the plaintiff and defendant of the said action, and of the costs of the said action, reference, and award.

A like count: Law v. *Blackburrow*, 14 C. B. 77.

On an Award made under a Reference by a Judge's Order of an Action and of all matters in difference between the Parties.

That before and at the time of the making of the order hereinafter mentioned, the plaintiff had commenced an action in the court of —— against the defendant for the recovery of a certain debt claimed to be due from the defendant to the plaintiff, and other matters in difference were then depending between the plaintiff and the defendant; and thereupon by an order made on the —— day of ——, A.D ——, in the said action by one of the judges of the said court, with the consent of the plaintiff and the defendant, it was ordered that the said action and all matters in difference between the said parties should be referred to the arbitration of *G. H.*, so as he should make and publish his award in writing of and concerning the said matters referred, ready to be delivered to the said parties on or before the —— day of ——, A.D. ——, or any further day to which the said arbitrator should enlarge the time for making the said award not later than the —— day of ——, A.D. ——, and that the plaintiff and the defendant should in all things abide by, perform, and keep the said award, and that the costs of the said action should abide the event thereof, and the costs of the said reference

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but a special count is more convenient, in case of the action going to trial, because under the former the plea of the general issue disputes the submission and all the proceedings necessary to support the award, whereas under the latter form of count all the allegations are admitted which are not specifically traversed. (See *Pleas*, "*Arbitration*," *post*, ch. 5.)

and award should be in the discretion of the said arbitrator; and the said *G. H.* in pursuance of the said order took upon himself the said reference, and after having duly enlarged the time for making the said award until the —— day of ——, A.D. ——, before that day [*or, if the arbitrator's power to enlarge the time had expired, and a second judge's order had been obtained for that purpose, it may be averred thus:* And the said *G. H.* did not make any award on or before the said —— day of ——, A.D. ——, and by an order made on the —— day of ——, A.D. ——, by one of the judges of the said court, with the consent of the plaintiff and the defendant, it was ordered that the time for the making of the said award should be enlarged until the —— day of ——, A.D. ——, and after the making of the last-mentioned order, and before the last-mentioned day, the said *G. H.*] made and published his award in writing respecting the said matters referred, ready to be delivered to the said parties, and thereby determined the said action in favour of the plaintiff, and awarded that he was entitled to recover therein from the defendant £—— for his said debt, and that the defendant should pay the said £—— to the plaintiff, and that the defendant was further indebted to the plaintiff in £—— in respect of the said other matters in difference between them, and that the defendant should pay the said £—— to the plaintiff, and that the defendant should pay his own costs of the said reference and the costs of the said award, and should pay to the plaintiff his the plaintiff's costs of the said reference; and the plaintiff's costs of the said action and of the said reference and the costs of the said award were duly taxed at £——, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said sums of £——, £——, and £——; yet the defendant did not pay to the plaintiff the said sums of £——, £——, and £——, or any of them.

Like counts: Gisborne v. *Hart*, 5 M. & W. 50; *Sutcliffe* v. *Brooke*, 3 D. & L. 302; *Dresser* v. *Stansfield*, 14 M. & W. 822; *Hawkins* v. *Benton*, 8 Q. B. 479; *Harrison* v. *Creswick*, 13 C. B. 399; *Armitage* v. *Coates*, 4 Ex. 641.

A like count on a reference of an action of ejectment: Mays v. *Cannell*, 15 C. B. 107.

On an award under a reference by an order of nisi prius: Bonner v. *Charlton*, 5 East, 139.

On an award under a reference by an order in Chancery: Dowse v. *Coxe*, 3 Bing. 20.

Upon an Umpirage made under an Agreement of Reference.

That before and at the time of the making of the agreement hereinafter mentioned, matters in difference were depending between the plaintiff and the defendant; and thereupon, by an agreement dated the —— day of ——, A.D. ——, it was agreed by and between the plaintiff and the defendant that the said matters in difference should be, and the same were thereby referred to the arbitration of *G. H.* and *I. K.*, or in case they should disagree then to the umpirage of such person as the said *G. H.* and *I. K.* should in manner therein mentioned appoint in that behalf, so as the said arbitrators or umpire should make their award or his umpirage in writing ready to be delivered to the said parties on or before the —— day of ——, A.D. ——, or on or before such other day as the said arbitrators or

umpire should in manner therein mentioned appoint, and that the costs of the said reference and award or umpirage should be in the discretion of the said arbitrators or umpire, and that the plaintiff and the defendant would in all things abide by, perform, and keep the said award or umpirage; and the said *G. H.* and *I. K.* took upon themselves the said reference, and duly appointed *L. M.* to be such umpire as aforesaid, and the said *G. H.* and *I. K.* having disagreed in the said reference the said *L. M.* afterwards took upon himself the said umpirage, and having duly enlarged the time for making his umpirage in the premises until the —— day of ——, A. D. ——, did before that day make and publish his umpirage in writing respecting the said matters referred ready to be delivered to the said parties, and thereby awarded that £—— was due and owing from the defendant to the plaintiff in respect of the said matters referred, and that the defendant should pay the said £—— to the plaintiff on or before the —— day of —— then next, and that the plaintiff and the defendant should each pay one half of the costs of the said umpirage, and should each pay his own costs of the said reference; and the time for the payment of the said £—— elapsed, yet the defendant did not pay the same.

Counts on a reference to a single arbitrator: Roberts v. *Eberhardt*, 27 L. J. C. P. 70; 3 C. B. N. S. 482; *Smith* v. *Trowsdale*, 3 E. & B. 84; *Hatton* v. *Royle*, 3 H. & N. 500.

Count on a reference to three arbitrators. Duckworth v. *Harrison*, 4 M. & W. 432.

Count on a reference by agreement to two arbitrators and a third appointed by them: Bates v. *Townley*, 1 Ex. 572; *Wade* v. *Dowling*, 4 E. & B. 44; *Williams* v. *Wilson*, 9 Ex. 90; 23 L. J. Ex. 17.

Like counts against executors: Dowse v. *Coxe*, 3 Bing. 20; *Riddell* v. *Sutton*, 5 Bing. 200; *Williams* v. *Wilson*, 9 Ex. 90, 23 L. J. Ex. 17.

On an arbitration bond conditioned to perform the award: Welch v. *Ireland*, 6 East, 613; *Ferrer* v. *Oven*, 7 B. & C. 427.

Count for the breach of an agreement contained in a contract to refer to arbitration all disputes which might arise as to the contract (*a*): *Livingston* v. *Ralli*, 5 E. & B. 132; 24 L. J. Q. B. 269; *Beckh* v. *Page*, 28 L. J. C. P. 164; 5 C. B. N. S. 708.

For refusing to choose an arbitrator: Marsack v. *Webber*, 29 L. J. Q. B. 109.

(*a*) This action is maintainable, but will not in general serve any useful purpose, as the damages can only be nominal. (*Livingston* v. *Ralli*, 5 E. & B. 132; 24 L. J. Q. B. 269.) Unless the performance of the agreement is secured by a stipulation for liquidated damages in case of breach. (See *Street* v. *Rigby*, 6 Vesey, 814.) It may be usefully applied in those cases where, by the terms of a contract, the price or damages have to be ascertained by arbitration as a condition precedent to their recovery by action. (See *Avery* v. *Scott*, 8 Ex. 487; 25 L. J. Ex. 308; *Goldstone* v. *Osborn*, 2 C. & P. 551. And see the C. L. P. Act 1854, s. 11.)

As to when references can be enforced under the C. L. P. Act, 1854, ss. 12, 13, see *re Cox*, 6 W. R. Ex. 664.

For refusing to appoint a valuer to ascertain damages in pursuance of an agreement: Thomas v. *Fredericks*, 10 Q. B. 775.

Count upon an agreement of reference for revoking the arbitrator's authority: Warburton v. *Storr*, 4 B. & C. 103.

Special count by arbitrators for their fees against the parties liable to the costs under the award: Hoggins v. *Gordon*, 3 Q. B. 466 (*a*).

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Assignees of a Bankrupt (*b*).

Indebitatus Count by the Assignees of a Bankrupt upon Causes of Action accrued before the Bankruptcy, and upon Accounts stated with the Assignees.

(*Commence with form, ante, p.* 19.) Money payable by the

(*a*) This case was decided on demurrer, whereby the special contract charged in the declaration to pay according to the award was admitted. As to the contract made in fact with the arbitrators in respect of their compensation and the manner of suing upon it, see *Bates* v. *Townley*, 2 Ex. 165.; *re Coombs*, 4 Ex. 841. An arbitrator generally protects himself by retaining his lien upon the award until his fees are paid. If an excessive charge is paid to him in order to take up the award, the party paying it may recover back the overcharge in an action for money had and received. (*Barnes* v. *Braithwaite*, 2 H. & N. 569.) It is doubtful whether an arbitrator can assess his own fees in the award. (*Threlfall* v. *Fanshaw*, 19 L. J. Q. B. 334; *Parkinson* v. *Smith*, 30 L. J. Q. B. 178.)

(*b*) *Actions by assignees of a bankrupt.*—Under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, an official assignee was appointed immediately upon adjudication, to act as sole assignee until the appointment of other assignees by the creditors (ss. 40, 102); when the latter were chosen (s. 139), they became on their appointment joint assignees with him of the bankrupt's estate.

The personal estate of the bankrupt vested in the assignees thus appointed, under the 141st section of the Act, which enacted that, "when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London, or otherwise; but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

The real estate of the bankrupt vested in the assignee in a similar manner by s. 142.

By s. 153, it was enacted that "the assignees, with the leave of the court first obtained, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended; and in such

defendant to the plaintiffs as assignees as aforesaid, for goods sold and delivered by the said *E. F.* before he became bankrupt to the defendant, and for goods then bargained and sold by the said *E. F.*

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case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt; and with like leave of the court, after notice to such creditors, and subject to such condition (if any) as to obtaining the consent of creditors, or any proportion of them, as the court shall think fit to direct, the assignees may take such reasonable part of any debts due to the bankrupt's estate as may by composition be gotten, or may give time to take security for the payment of such debts, and may submit to arbitration any difference or dispute between the assignees and any other person for, or on account, or by reason of anything relating to the estate and effects of the bankrupt."

By s. 157, "whenever an assignee shall die or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he had originally commenced the same."

The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, has made material alterations in the law respecting the appointment of assignees and their rights of action. The sections of the Bankrupt Law Consolidation Act, 1849, above cited, are not repealed, except as far as they are inconsistent with the new Act.

The official assignee is now appointed by the court as before, under the old Act, s. 102; and by s. 108 of the new Act it is provided that, "immediately on adjudication, it shall be the duty of the official assignee to take possession of the bankrupt's estate, and to retain possession thereof until the appointment of a creditors' assignee."

As to the choice of a creditors' assignee, s. 116 enacts that, "At the first meeting of creditors, or any adjournment thereof, it shall be competent to the majority in value of the creditors who have proved debts, to choose an assignee or assignees of the bankrupt's estate and effects, to be called the creditors' assignee." And by s. 117, "upon the appointment of the creditors' assignee, all the estate, both real and personal, of the bankrupt shall be devested out of the official assignee, and vested in the creditors' assignee."

The effect of these sections, combined with the former law, seems to be, that the official assignee is sole assignee of the estate of the bankrupt, and entitled to sue in respect thereof until the appointment of the creditors' assignee (subject to the effect which the appointment of the creditors' assignee might afterwards have on any action pending). The subsequent rights and duties of the official and creditors' assignees are more particularly described in the following sections:—

By s. 127, "the creditors' assignee shall manage and, except as herein provided (see the next section), realise and recover the estate belonging to the bankrupt wherever situated, and convert the same into money." By s. 128, "the official assignee shall collect, realize, and recover every debt due to the estate, the amount of which shall not exceed the sum of ten pounds; and as to all such sums of money he shall be, and shall be deemed sole assignee of the estate, notwithstanding the appointment of a creditors' assignee."

Hence it appears that the right of action (except in cases falling under sect. 182 *infra*) for *debts* due to the estate, depends upon whether the debt exceeds ten pounds or not. In the former case the creditors' assignees being the proper plaintiffs, and in the latter the official assignee only being entitled

to the defendant, and for work then done and materials then provided by the said *E. F.* for the defendant at his request, and for money then lent by the said *E. F.* to the defendant, and for money then paid by the said *E. F.* for the defendant at his request, and for money then received by the defendant for the use of the said *E. F.*, and for interest upon money then due from the defendant to the said *E. F.* and then forborne at interest by the said *E. F.* to the defendant at his request, and for money found to be due from the defendant to the said *E. F.* on accounts then stated between them, and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, on accounts stated between the plaintiffs, as assignees as aforesaid, and the defendant.

Indebitatus Count by the Assignees of a Bankrupt upon Causes of Action accrued after the Bankruptcy.

(*Commence with form, ante*, p. 19.) Money payable by the defendant to the plaintiffs, as assignees as aforesaid, for goods sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendant, and for goods bargained and sold by the plaintiffs, as assignees as aforesaid, to the defendant, and for work done and materials provided by the plaintiffs, as assignees as aforesaid, for the defendant at his request, and for money received by the defendant for the use of the plaintiffs, as assignees as aforesaid, and for interest upon money due from the defendant to the plaintiffs, as assignees as aforesaid, and forborne at interest by the plaintiffs, as assignees as

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to sue. But it should seem that there can be no objection to the official assignee claiming several debts to any aggregate amount in one action, provided each separate debt does not exceed the amount for which he is entitled to sue.

It may be advisable, in the absence of any authority on the construction of these sections, to insert an express allegation in the declaration, that the debts claimed are such as the assignee who is bringing the action is entitled to recover. The following form may be used for this purpose, and may be inserted after the statement of the causes of action, and immediately before the words, "And the plaintiff, as assignee as aforesaid, claims £——;" "And the plaintiff says that the said several moneys are debts due to the estate of the said bankrupt which the plaintiff, as such official [*or* creditors'] assignee [*or* assignees], is [*or* are] entitled to recover in this action by virtue of the said statutes."

If the official assignee sues as sole assignee, after an order of discharge of the creditors' assignee, under sec. 182, the last averment would not be applicable, but it may be advisable to insert an allegation, showing that the plaintiff is entitled to sue as sole assignee under that section, when the amount of the debt will be immaterial.

By s. 182, "where the creditors' assignee has obtained an order of discharge, the official assignee first appointed in the matter of the bankruptcy shall, as to any estate and effects of the bankrupt not realized at the time of such order of discharge, and as to all debts then remaining uncollected, and which shall not have been sold in manner herein provided, and as to any future-acquired property of the bankrupt, if made liable to the creditors under the conditions of discharge, represent the estate in all respects as the sole assignee thereof, and shall have and exercise all the rights, duties, powers, and authorities conferred by this Act upon official and creditors' assignees."

aforesaid, to the defendant at his request, and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, upon accounts stated between the plaintiffs, as assignees as aforesaid, and the defendant.

Indebitatus Count by the Assignees of a Bankrupt Partner jointly with the Solvent Partner (*a*).

(*Commence with the form, ante,* p. 20.) Money payable by the defendant to the said *A. B.* and to the said *C. D.* and *E. F.* as assignees as aforesaid, for goods sold and delivered by the said *A. B.* and the said *G. H.* before he became bankrupt to the defendant, and for goods then bargained and sold by the said *A. B.* and the said *G. H.* to the defendant, and for work then done and materials then provided by the said *A. B.* and the said *G. H.* for the defendant at his request, and for money then lent by the said *A. B.* and the said *G. H.* to the defendant, and for money then paid by the said *A. B.* and the said *G. H.* for the defendant at his request, and for money then received by the defendant for the use of the said *A. B.* and the said *G. H.*, and for interest upon money then due from the defendant to the said *A. B.* and the said *G. H.*, and then forborne at interest by them to the defendant at his request, and for money found to be due from the defendant to the said *A. B.* and the said *G. H.* on accounts then stated between them.

Special Count by the Assignees of a Bankrupt for not accepting Goods sold by him.

(*Commence with form, ante,* p. 19.) That before the said *E. F.* became bankrupt, he bargained and sold to the defendant, and the defendant bought of the said *E. F.* certain goods, that is to say [*state the kind of goods generally*], to be delivered by the said *E. F.* to the defendant, and to be accepted by the defendant, at the price of £——, to be paid by the defendant to the said *E. F.* in cash upon the delivery of the said goods [*or as the case may be according to the terms of the contract*]; and all conditions have been fulfilled, and all things have happened, and all times have elapsed necessary to entitle the said *E. F.* before he became bankrupt [*or* the plaintiffs as assignees as aforesaid] to the performance of the said contract

(*a*) The Bankrupt Law Consolidation Act, 1849, s. 152, enacts, "That if any person adjudged bankrupt shall at the time of the adjudication of bankruptcy be a member of a firm, it shall be lawful for the court to authorize the assignees, upon their application, to commence or prosecute any action at law or suit in equity, in the name of such assignees and of the remaining partner, against any debtor of the partnership, and such judgment, decree, or order may be obtained therein, as if such action or suit had been instituted with the consent of such partner, and if such partner shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void; provided that every such partner shall have notice given him of such application, and be at liberty to show cause against it, and, if no benefit be claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as the court may direct; and that it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct."

by the defendant; yet the defendant has not accepted the said goods, or paid the said price thereof.

A like count for not paying for the goods sold by an acceptance: *Groom* v. *West*, 8 A. & E. 758.

By the Assignee of Debts sold by the Assignees of a Bankrupt under the Bankruptcy Act, 1861, *s.* 137 (*a*).

That the defendant, before and at the time when *G. H.* became bankrupt as hereinafter mentioned, was indebted to the said *G. H.* in £—— for money payable by the defendant to the said *G. H.* for goods sold and delivered by the said *G. H.* to the defendant [*or as the case may be, stating the debts according to the fact*]; and the said *G. H.*, after the passing of the Bankruptcy Act, 1861, committed an act of bankruptcy, and became and was a bankrupt within the meaning of the statutes then in force concerning bankrupts, and a petition for adjudication of bankruptcy against the said *G. H.* was duly filed in the Court of Bankruptcy in London according to the said statutes, and such proceedings were thereupon had in the matter of the said petition that the said *G. H.* was duly adjudged bankrupt, and *J. K.* was then duly appointed by the said Court to be, and became and was the official assignee of the estate and effects of the said *G. H.* under his said bankruptcy, and *L. M.* and *N. O.* were afterwards duly chosen and appointed and became and were creditors' assignees of the said estate and effects, and all things necessary in that behalf having happened and been done, the said debts hereinbefore mentioned became and were vested in the said assignees, or some or one of them, as assignees aforesaid; and afterwards and at the expiration of twelve months from the said adjudication [*or, if at an earlier period*, with the approbation of the said Court], the said *J. K.*, *L. M.*, and *N. O.* sold by auction [*or* by tender, *or*, with the sanction of the said Court, by private contract] the said debts, the same being book-debts due [*or* growing due] to the said *G. H.*, and assigned the same to the plaintiff; and the said debts are still due and unpaid, and all conditions have been performed, and all things have happened, and all times have elapsed, necessary to vest the said debts in the plaintiff, and to entitle him, as such assignee as aforesaid, to sue for and recover the same from the defendant.

(*a*) By the Bankruptcy Act, 1861, s. 137, it is enacted that at any time after the expiration of twelve months from adjudication, or at any earlier period with the approbation of the Court, the assignees may sell by auction or tender, or, with the sanction of the Court, by private contract, all or any of the book debts due or growing due to the bankrupt, and the books relating thereto, and the goodwill of his trade or business, and assign the same to the purchaser; and such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually, and with the same privileges concerning proof of the requisites of bankruptcy and other matters, as the assignee himself.

The corresponding enactment of the Bankrupt Law Consolidation Act, 1849, s. 188, is repealed by the new Act. The terms of that section are slightly different, but a declaration may be framed upon it by making the necessary alterations in the above form.

Count by the assignees under an Irish bankruptcy upon causes of action accrued to the bankrupt in England: Fergusson v. *Spenser*, 1 M. & G. 987.

Count by the syndics of a French bankrupt: Alivon v. *Furnival*, 1 C. M. & R. 277.

Special counts on contracts made with the bankrupt, not executed before the bankruptcy, and adopted by the assignees: Gibson v. *Carruthers*, 8 M. & W. 321; *Lawrence* v. *Knowles*, 5 Bing. N. C. 400; *Twenlow* v. *Askey*, 6 Dowl. 597.

Counts by the assignees of a bankrupt or insolvent on bills and notes: See "Bills of Exchange," post, p. 85.

Assignees of an Insolvent. (*a*)

Indebitatus Count by the Assignees of an Insolvent upon Causes of Action accrued to the Insolvent, and Accounts stated with the Assignees.

(*Commence with the form, ante*, p. 19.) Money payable by the defendant to the plaintiffs, as assignees as aforesaid, for goods sold and delivered by the said *E. F.* before he was devested of his debts, estate, and effects under the said statutes, to the defendant, and for goods then bargained and sold by the said *E. F.* to the defendant, and for work then done and materials then provided by the said *E. F.* for the defendant at his request, and for money then lent by the said *E. F.* to the defendant, and for money then paid by the said *E. F.* for the defendant at his request, and for money then received by the defendant for the use of the said *E. F.*, and for interest upon money then due from the defendant to the said *E. F.*, and by him then forborne at interest to the defendant at his request, and for money found to be due from the defendant to the said *E. F.* on accounts then stated between them, and for money found to be due from the defendant to the plaintiffs, as assignees as aforesaid, on accounts stated between the plaintiffs, as assignees as aforesaid, and the defendant.

Indebitatus Count upon Causes of Action accrued to the Assignees.

(*Commence with the form, ante*, p. 19.) Money payable by the defendant to the plaintiffs, as assignees as aforesaid, for goods sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendant, and for goods bargained and sold by the plaintiffs, as assignees as aforesaid, to the defendant, and for work done and materials provided by the plaintiffs, as assignees as aforesaid, for the defendant at his request, and for money received by the defendant for the use of the plaintiffs, as assignees as aforesaid, and for money found to be due from the defendant to the plaintiffs, as

(*a*) The jurisdiction in insolvency is abolished, except as to pending proceedings, by the Bankruptcy Act, 1861, ss. 19, 20.

assignees as aforesaid, on accounts stated between the plaintiffs, as assignees as aforesaid, and the defendant (*a*).

Attachment of Debt.

Declaration against Garnishee under the C. L. P. Act, 1854; 17 & 18 *Vict. c.* 125, *s.* 64.

See form given in R. G. M. V. 1854, *Sched.* 25, *ante, pp.* 18 & 27; *Johnson* v. *Diamond*, 11 Ex. 73; *Jauralde* v. *Parker*, 6 H. & N. 431. *As to the effect of attachment under the above Act, see post*, "*Attachment of Debt*," ch. 5.

Attorney (*b*).

Indebitatus Counts for Work done as an Attorney.

Money payable by the defendant to the plaintiff for the work, journeys, and attendances of the plaintiff, by him done, performed, and bestowed as the attorney and solicitor of and for the defendant, and otherwise, for the defendant at his request, and for fees payable by the defendant to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work for the defendant at his request.

Indebitatus Count for Work done by an Attorney as Agent for another Attorney.

Money payable by the defendant to the plaintiff for the work, journeys, and attendances of the plaintiff, by him as an attorney and solicitor and otherwise done, performed, and bestowed as agent and otherwise for the defendant at his request, and for fees payable by the defendant to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work for the defendant at his request.

By an attorney for a wrongful dismissal after a permanent re-

(*a*) The assignees cannot recover in respect of work and labour performed by the insolvent necessary for his maintenance after the vesting order and before his discharge. (*Williams* v. *Chambers*, 10 Q. B. 337.) As to rights of action of assignees under the Protection Acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. See *Sayer* v. *Dufaur*, 11 Q. B. 325.

(*b*) The statutes relating to attorneys are the 6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 127. An attorney being a sole plaintiff, and suing in person in his own right, has the privilege of suing in his own court, and (in personal actions) of laying and retaining the venue in Middlesex. (1 Chit. Pr. 11th ed. 77; *Grace* v. *Wilmer*, 26 L. J. Q. B. 1; 6 E. & B. 982.) An attorney being a sole defendant, and sued in his own right, must be sued in the court of which he is an attorney, but has no privilege as to venue. (*South Staffordshire Ry. Co.* v. *Smith*, 5 Ex. 472; *Yeardly* v. *Roe*, 3 T. R. 573.) If sued in any other court, he may plead his privilege in abatement. (See "*Abatement*," *post*, ch. 5.)

tainer: Elderton v. *Emmens*, 4 C. B. 479; 6 C. B. 160; 13 C. B. 495.

Against an Attorney for Negligence in conducting an Action at the suit of the Plaintiff (a).

That in consideration that the plaintiff retained the defendant, as and being an attorney of the court of ——, to conduct an action in that court at the suit of the plaintiff against *G. H.* for the recovery of money claimed to be due to the plaintiff from the said *G. H.*, for reward to the defendant, the defendant accepted such retainer, and promised the plaintiff to conduct the said action with due and proper care, skill, and diligence; yet the defendant did not conduct the said action with due and proper care, skill, and diligence, whereby the plaintiff was obliged to suffer himself to be nonsuited therein, and lost the costs and expenses incurred by him in prosecuting the said action, and was obliged [*or* became liable] to pay the costs incurred by the said *G. H.* in defending the same, and the plaintiff has been delayed in recovering the said money, and is likely to lose the same.

A like count for not instructing counsel to appear at the trial, whereby the plaintiff was compelled to withdraw the record: Hawkins v. *Harwood*, 4 Ex. 503.

A like count for negligently conducting a suit in Chancery: Franklin v. *Cole*, 2 C. & J. 590.

A like count for compromising an action contrary to the directions of the client: Fray v. *Vowles*, 28 L. J. Q. B. 232.

A like count for neglect in recovering the amount of a bill delivered to him for the purpose of suing the parties liable: Langdon v. *Wilson*, 7 B. & C. 640 *n* (*b*).

Against an Attorney for Negligence in Defending an Action.

That in consideration that the plaintiff retained the defendant, as and being an attorney of the court of ——, to conduct the defence of the now plaintiff in an action depending in that court at the suit of *G. H.* against the now plaintiff, for reward to the defendant, the defendant accepted such retainer, and promised the plaintiff to conduct the said defence with due and proper care, skill, and diligence; yet the defendant did not conduct the said defence with due and proper care, skill, and diligence, whereby the said *G. H.* recovered in the said action a judgment against the now plaintiff for a large sum of money as for the damages and costs of the said *G. H.* therein, and the plaintiff became liable to pay other costs and expenses.

A like count where the action was taken as undefended: Hoby v. *Built*, 3 B. & Ad. 350.

A like count where the judgment was suffered to go by default: Godefroy v. *Jay*, 7 Bing. 413.

Against an Attorney for investing the plaintiff's Money upon insufficient Security.

That in consideration that the plaintiff retained the defendant, as

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(*a*) As to what amounts to negligence in an attorney, see *Chapman* v. *Van Toll*, 8 E. & B. 396.

and being an attorney and solicitor, for reward to the defendant, to invest certain money of the plaintiff, for the plaintiff at interest upon good and sufficient security, the defendant promised the plaintiff that he would invest the said money for the plaintiff at interest upon good and sufficient security; yet the defendant invested the said money upon bad and insufficient security, whereby it became lost to the plaintiff.

Like counts: Whitehead v. *Greetham*, 2 Bing. 464; *Dartnall* v. *Howard*, 4 B. & C. 345; *Hayne* v. *Rhodes*, 8 Q. B. 342; *Watts* v. *Porter*, 3 E. & B. 743; 23 L. J. Q. B. 345.

Against an attorney for not investing on mortgage money deposited with him for that purpose: Harman v. *Johnson*, 2 E. & B, 61.

Against an attorney for not paying over money received under an execution: Bevins v. *Hulme*, 15 M. & W. 88; 3 D. & L. 309.

Against an attorney for negligence in preparing an instrument of simple contract instead of under seal: Parker v. *Rolls*, 14 C. B. 691.

Against an attorney for negligently allowing his client to execute a conveyance containing an improper covenant: Stannard v. *Ullithorne*, 10 Bing. 491.

Against an attorney for disclosing a defect in his client's title: Taylor v. *Blacklow*, 3 Bing. N. C. 235.

Against an attorney employed to effect a mortgage for not taking proper care in investigating the title: Brumbridge v. *Massey*, 28 L. J. Ex. 59; *Wigens* v. *Cook*, 6 C. B. N. S. 784.

Against an attorney for not taking care of his client's papers: North-western Railway Company v. *Sharpe*, 10 Ex. 451.

Auctioneer.

Indebitatus Count for Work done as an Auctioneer and Appraiser.

Money payable by the defendant to the plaintiff for the work, journeys, and attendance of the plaintiff, by him done, performed, and bestowed as an auctioneer and appraiser, and otherwise for the defendant at his request, and for materials and necessary things by the plaintiff provided, in and about the said work for the defendant, at his request.

By an auctioneer against his employer on the implied indemnity against defect of title to the goods sold: Adamson v. *Jarvis*, 4 Bing. 66.

Count by an Auctioneer against a Purchaser of several distinct lots, on the Conditions of Sale.

That at divers times and by —— separate contracts, the plaintiff bargained and sold to the defendant by auction, and the defendant bought from the plaintiff —— different lots of goods at certain prices to be paid by the defendant to the plaintiff for the same, and upon the terms that the defendant should pay down, in part payment of the price of each lot, a deposit at the rate of £—— per cent., and that the respective lots should be absolutely cleared away at the defendant's expense within one day after the sale of each of the said

lots respectively, and that the remainder of the purchase money should be paid on or before the delivery of each of the said lots respectively, and that if the defendant should leave the said lots respectively uncleared or by any neglect omit paying for the same, he should pay to the plaintiff interest at the rate of £—— per cent. by the year, on the amount of the price of such lots respectively from the days of sale respectively until payment of the said price, and all expenses attending the delay; and all conditions were fulfilled and all things happened and all things elapsed necessary to entitle the plaintiff to have the said terms observed and performed by the defendant in respect of each of the said contracts and to maintain this action for the breaches hereinafter alleged; yet the defendant did not in pursuance of any of the said contracts pay down any such deposit as aforesaid or clear away any of the said lots respectively as aforesaid within the time aforesaid or at any other time, or pay the said price for the same or any part thereof; and although the plaintiff by reason of the premises, incurred expenses in keeping the said goods respectively for a long space of time, yet the defendant has not paid the said expenses or such interest as aforesaid on the said price of the said lots or any of them.

Count against an auctioneer for not selling without reserve according to the advertisement of the sale: see Warlow v. *Harrison*, E. & E. 295, 309; 29 L. J. Q. B. 14.

AVERAGE. *See "Insurance," post.*

AWARD. *See "Arbitration," ante,* p. 56.

BAIL BOND.

By the Assignee of a Bail-bond against the Principal and the Bail (a).

(*Venue.*) *A. B.*, assignee of *C. D.*, sheriff of the county of——,

(a) By the 4 Anne, c. 16, s. 20, it is enacted, That if any person or persons shall be arrested by any writ, bill, or process, issuing out of any of her Majesty's courts of record at Westminster, at the suit of any common person, and the sheriff or other officer taketh bail from such person against whom such writ, bill, or process is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp; provided the assignment so indorsed be duly stamped before any action be brought thereupon, and if the said bail-bond or assignment or other security taken for bail be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit

according to the statute in such case made and provided, by *E. F.* the attorney of the said *A. B.*, sues *G. H.*, *K. L.*, and *M. N.*, for that the defendants by their bond dated the —— day of ——, A.D. ——, became bound to the said *C. D.*, as and being such sheriff as aforesaid, in the sum of £——, to be paid to the said sheriff or his assigns, subject to a certain condition thereunder written, whereby, after reciting as the fact was, that the said *G. H.* was, on the —— day of ——, A.D. ——, taken by the said sheriff in his bailiwick, by virtue of the Queen's writ of capias issued out of the court of ——, bearing date at Westminster, the —— day of ——, A.D. ——, to the said sheriff directed and delivered, against the said *G. H.* in an action at the suit of the now plaintiff, and that a copy of the said writ, together with every memorandum and notice subscribed thereto and all indorsements thereon, was on the execution thereof delivered to the said *G. H.* and that he was by the said writ required to cause special bail to be put in for him in the said court to the said action, within eight days after execution thereof on him, inclusive of the day of such execution, the condition of the said bond was declared to be such that if the said *G. H.* should cause special bail to be put in for him to the said action in the said court, as required by the said writ, then the said obligation should be void; yet the said *G. H.* did not cause special bail to be put in for him to the said action in the said court, as required by the said writ, but therein made default, whereby the said bond became forfeited; and thereupon the said *C. D.*, as such sheriff as aforesaid, at the request of the plaintiff, by an indorsement in writing on the said bond under the hand and seal of the said *C. D.* as such sheriff as

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thereupon in his own name, and the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action and to the bail upon the said bond or other security taken from such bail, as is agreeable to justice and reason, that such rule or rules of the said court shall have the nature and effect of a defeasance to such bail-bond or other security for bail.

As to declaring upon Bonds. (See "*Bonds*," *post*, p. 96.) The declaration in an action upon the bail-bond at the suit of the sheriff, may be in the form of that upon a common money bond, without setting out the condition. (See *post*, p. 98.) In an action on the bail-bond at the suit of the assignee, it is necessary to set out the condition in the declaration, in order to show that the bond is forfeited and that the plaintiff is entitled to sue as assignee under the statute. It is sufficient to state generally in the declaration, that the sheriff assigned the bond to the plaintiff according to the form of the statute, without adding that the assignment was under the hand and seal of the sheriff and executed in the presence of witnesses. (2 Wms. Saund. 61 *b*; *Lewis* v. *Parkes*, 3 M. & W. 133.)

The action by the assignee of the bail-bond, must be brought in the same court as the original action. (*Wilson* v. *Hartley*, 7 Dowl. 461, 462.) By r. 83, H. T. 1853, "An action may be brought upon a bail-bond by the sheriff himself in any court."

By r. 85, H. T. 1853, "Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more." (See *Key* v. *Hill*, 2 B. & Ald. 598; *Johnson* v. *Macdonald*, 2 Dowl. 44; *Jallicks* v. *Costar*, 28 L. J. Ex. 209.)

The sheriff is liable to an action for refusing to assign the bail-bond at the request of the plaintiff. (*Stamper* v. *Milbourne*, 7 T. R. 122; *Mender* v. *Bridges*, 5 Taunt. 325.)

aforesaid, duly assigned the said bond to the plaintiff, according to the statute in such case made and provided (*a*).

Like counts: Sharpe v. *Abbey*, 5 Bing. 193; *Grottick* v. *Phillips*, 9 Bing. 721; *Lewis* v. *Parkes*, 3 M. & W. 133.

Bail, Recognizance of.

On a Recognizance of Bail in the Queen's Bench or Exchequer (*b*).

(*Venue, Middlesex.*) That the defendants heretofore, on the —— day of ——, A.D. ——, came into the court of ——, at Westminster, in their proper persons, and became pledge and bail for *J. K.*, that if he should happen to be convicted at the suit of the plaintiff in a certain action then depending in the said court at the suit of the plaintiff against the said *J. K.*, then the defendants consented that all such moneys as should be adjudged to the plaintiff in that behalf, should be made of their and each of their lands and chattels, and levied to the use of the plaintiff, if it should happen that the said *J. K.* should not pay the said moneys or render himself to the Queen's prison on that occasion, as by the record of the said recognizance remaining in the said court fully appears; and although the plaintiff afterwards, by the judgment of the said court, recovered in the said action against the said *J. K.* £—— for his damages and costs of suit in that behalf whereof the said *J. K.* was convicted, yet the said *J. K.* has not paid to the plaintiff the said moneys, nor rendered himself to the Queen's prison aforesaid on that occasion according to the said recognizance, and as well the said recognizance as the said judgment still remain in force, and the plaintiff has not obtained any execution or satisfaction of the said judgment, and the said moneys still remain due and unpaid to the plaintiff.

Bailments (*c*).

Indebitatus Count by a Warehouseman for keeping and taking care of Goods (*d*).

Money payable by the defendant to the plaintiff for work done

(*a*) In declaring upon a bond it is sufficient for the plaintiff to state the debt under the bond, without alleging a breach by non-payment. (*Ashbee* v. *Pidduck*, 1 M. & W. 564.)

(*b*) The recognizance of bail being matter of record, and entered in the court in which the original action is pending, the venue must be laid in Middlesex, where the record is. (1 Chit. Pl. 7th ed. 281.) A recognizance is not a record until enrolled. (*Glynn* v. *Thorpe*, 1 B. & Ald. 153.)

See the forms of recognizances of bail in the Queen's Bench, Exchequer, and Common Pleas, and of the entries: Chitty's Forms, 9th ed. 408.

The declaration on a recognizance of bail in the Common Pleas may be framed by adapting the above declaration to the form of recognizance used in that court.

As to the law and practice in this action, see Chit. Pr. 11th ed. 874.

(*c*) For the law of bailments see the notes to *Coggs* v. *Bernard*, 1 Smith's L. C. 5th ed. 171.

(*d*) When a chattel is detained under a claim of lien against the owner, and charges are incurred in keeping and taking care of it, no claim can be

by the plaintiff in keeping and taking care of goods for the defendant at his request, and for warehouse-room for the said goods by the plaintiff found and provided for the defendant at his request.

Indebitatus Count by a Wharfinger for Wharfage and Warehouse-room.

Money payable by the defendant to the plaintiff for the wharfage and warehouse-room of goods landed, stowed, and kept by the plaintiff, in and upon a wharf, warehouse, and premises of the plaintiff, for the defendant, at his request.

Against a Bailee for not re-delivering Goods bailed.

That in consideration that the plaintiff delivered to the defendant certain goods to be safely kept and taken care of by the defendant, and to be re-delivered by the defendant to the plaintiff on request, for reward to the defendant, the defendant promised the plaintiff to safely keep and take care of the said goods, and to re-deliver the same to the plaintiff on request; and afterwards the plaintiff requested the defendant to re-deliver to him the said goods, and a reasonable time for the re-delivery thereof elapsed after such request, yet the defendant did not re-deliver the said goods to the plaintiff, whereby [the plaintiff was prevented from letting the said goods to hire to *G. H.*, and] the same are lost to the plaintiff.

Like counts: Moss v. *Smith*, 1 M. & G. 228; *Crossfield* v. *Such*, 8 Ex. 159; *Corbett* v. *Packington*, 6 B. & C. 268.

Count on a bailment of a ship for not re-delivering it according to the contract: European and Australian Royal Mail Co. v. *Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247.

Count for not returning half of a bank note delivered in inchoate payment of a debt which was never completed: Smith v. *Mundy*, 29 L. J. Q. B. 172.

Against a bailee for not re-delivering goods pledged with him as security for advances of money: Stanton v. *Collier*, 3 E. & B. 274.

Against a bailee on a joint bailment by several, not to be re-delivered except on a joint request of all, for refusing to re-deliver: Brandon v. *Scott*, 26 L. J. Q. B. 163; 7 E. & B. 234 (*a*).

Against a Bailee for not safely keeping Goods bailed.

That in consideration that the plaintiff would deliver to the defendant certain goods, to be safely kept and taken care of by the defendant for the plaintiff, and to be re-delivered by the defendant to the plaintiff on request, for reward to the defendant, the defendant promised the plaintiff to safely keep and take care of the said goods while the same should be in the defendant's care and keeping as

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made against the owner in respect of such charges. (*Somes* v. *British Empire Shipping Co.*, 30 L. J. Q. B. 229.)

(*a*) In this case it was held that one of the plaintiffs having induced the bailee to deliver to his separate request, the joint plaintiffs could not recover. See an action on a similar contract framed in detinue, *Foster* v. *Crabb*, 12 C. B. 136; *Atwood* v. *Ernest*, 13 C. B. 881.

aforesaid, and to re-deliver the same to the plaintiff on request; and the plaintiff delivered the said goods to the defendant, and the defendant received and had the same in his care and keeping for the purpose and on the terms aforesaid; yet the defendant did not safely keep and take care of the said goods while they were in his care and keeping as aforesaid, whereby they were spoiled, broken, and damaged.

A like count charging a second breach in refusing to re-deliver the goods: Moss v. *Smith*, 1 M. & G. 228; *Corbett* v. *Packington*, 6 B. & C. 268.

Against a bailee for losing goods: Cairns v. *Robins*, 8 M. & W. 258; *Corbett* v. *Packington*, 6 B. & C. 268.

Against a Livery Stable Keeper for not taking care of a Horse.

That in consideration that the plaintiff would deliver to the defendant, as and being a livery stable keeper, a horse of the plaintiff, to be kept in a separate stall in the defendant's stable, and to be taken due care of by the defendant, as such livery stable keeper as aforesaid, for reward to the defendant, the defendant promised the plaintiff to keep the said horse in a separate stall in the defendant's stable, and to take due care of the same as aforesaid: and the plaintiff delivered the said horse to the defendant, and the defendant received and had the same for the purpose and on the terms aforesaid; yet the defendant did not keep the said horse in a separate stall in the defendant's stable, nor did he take due care of the same as aforesaid; whereby the said horse was kicked and wounded by other horses, and became of no use to the plaintiff.

A like count: Legge v. *Tucker*, 1 H. & N. 500.

Count against an agister of cattle for negligently losing them: See ante, p. 54; *Corbett* v. *Packington*, 6 B. & C. 268.

Against a veterinary surgeon or farrier for negligent treatment of a horse delivered to him for medical treatment: see post, "Farrier," p. 133.

On a bailment of foreign mining shares by way of loan for not re-delivering them: Owen v. *Routh*, 14 C. B. 327.

A like count on a bailment of railway shares: Deacon v. *Gridley*, 15 C. B. 295.

See other counts on bailments, "Hire," post; and see counts framed in tort, "Bailments," post, ch. 3.

Bankers.

Indebitatus Count by Bankers for Commission, etc.

Money payable by the defendant to the plaintiffs for work done and materials provided by the plaintiffs as bankers and otherwise

for the defendant at his request, and for commission and reward due from the defendant to the plaintiffs in respect thereof, and for money lent by the plaintiffs to the defendant, and for money paid by the plaintiffs for the defendant at his request, and for interest upon money due from the defendant to the plaintiffs and forborne at interest by the plaintiffs to the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

Count by a joint-stock banking company, registered under the Joint-Stock Banking Company's Act, 1857, 20 & 21 *Vict. c.* 49, *on a contract made before registration: Liverpool Borough Bank* v. *Eccles,* 4 H. & N. 139.

Counts by and against the public officer of a banking company, under 7 *Geo. IV. c.* 46, *s.* 4: *see ante, p.* 22.

Against a Banker for not Paying a Customer's Check (a).

That the defendant was a banker, and carried on the business of a banker at a banking-house in ——; and thereupon the plaintiff retained and employed the defendant as his banker, and the defendant accepted the said retainer and employment, upon the terms (amongst other things) that the defendant would from time to time, out of any moneys of the plaintiff in his hands applicable to that purpose, pay on presentment any check which might be drawn by the plaintiff upon the defendant, and duly presented at the said banking-house of the defendant for payment by any person lawfully entitled to receive the amount of such check, not exceeding the amount of the moneys of the plaintiff in the hands of the defendant applicable to the payment thereof at the time of the presentment thereof; and afterwards the plaintiff drew a check directed to the defendant, and thereby required the defendant to pay to *G. H.* or bearer £——, and delivered the said check to the said *G. H.* [in payment of a debt due to the said *G. H.* from the plaintiff],

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(*a*) The relation between a banker and his customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's checks. (See *Pott* v. *Clegg,* 16 M. & W. 321, 328; *Hill* v. *Foley,* 2 H. L. C. 28.) Where the usual dealing of a banker was to credit a customer in his books against bills, etc. paid in, and to honour the checks of the customer, he was held liable for refusing to pay a check without having given notice that he discontinued such dealing. (*Cumming* v. *Shand,* 29 L. J. Ex. 129; 5 H. & N. 95.)

A banker paying a forged or altered check cannot charge the customer with the amount. (*Hall* v. *Fuller,* 5 B. & C. 750.)

With respect to the liability of bankers in paying checks drawn payable to order, it is enacted by 16 & 17 Vict. c. 59, s. 19, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the sanction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof.

and the said *G. H.*, being the lawful holder of the said check and entitled to receive the amount thereof, duly presented the said check at the said banking-house of the defendant for payment, and all conditions were fulfilled and all things happened and all times elapsed, necessary to entitle the plaintiff to have the said check paid by the defendant when so presented as aforesaid; yet the defendant did not pay the said check when so presented as aforesaid; whereby the plaintiff was injured in his credit and reputation [and the said *G. H.* refused to deal with the plaintiff, and deliver goods to the plaintiff on credit as he otherwise would have done].

Like counts: Whitaker v. *Bank of England*, 1 C. M. & R. 744; *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Rolin* v. *Steward*, 14 C. B. 595; *Cumming* v. *Shand*, 29 L. J. Ex. 129; 5 H. & N. 95.

Against a banker for not presenting within a reasonable time a check on a third party paid in by a customer: Hare v. *Henty*, 30 L. J. C. P. 302; *and see post*, p. 89, *n.* (*a*).

Against a banker for not complying with instructions as to the disposal of money deposited with him: Clerk v. *Laurie*, 1 H. & N. 452.

Against bankers for negligence in paying a crossed check: Bellamy v. *Marjoribanks*, 7 Ex. 389 (*a*).

Counts on bankers' checks, post, "Bills," etc. p. 88.

BANKRUPTS. *See* ASSIGNEES, *ante*, p. 60.

BILLS OF EXCHANGE, BANKERS' CHECKS, PROMISSORY NOTES (*b*).

(*a*) The statute 21 & 22 Vict. c. 79, which makes the crossing a material part of the check, and provides that a banker shall not pay a crossed check otherwise than to the banker named, or to a banker; further provides by sect. 4, that any banker paying a check which does not, at the time when it is presented for payment, plainly appear to be or to have been crossed, or to have been obliterated, added to, or altered, shall not be responsible, or incur any liability, by reason of his having paid the same to a person other than a banker or the banker named, unless such banker shall have acted *malâ fide*, or been guilty of negligence in so paying such check. And see further as to crossed checks, *post*, p. 89.

(*b*) The holder of a bill of exchange or promissory note may bring an action upon it in the ordinary way, or in certain cases has the option to proceed under the Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67. That Act provides, by sect. 1, that all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form, contained in Schedule A. to that Act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed, as provided by the Common Law Procedure Act, 1852, and a copy of the writ of sum-

Bills of Exchange, Inland Bills.

Drawer against Acceptor on a Bill payable to Drawer. (*C. L. P. Act, 1852, Sch. B.* 17.)

That the plaintiff, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the

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mons and the indorsements thereon, in case the defendant shall not have obtained leave to appear, and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to the Act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs.

By s. 2, a judge of any of the courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.

By s. 3, after judgment, the Court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or judge so to do, and on such terms as to the Court or judge may seem just.

By s. 6, the holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this Act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued.

By s. 7, the provisions of the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said Acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act. (See *Knight* v. *Pocock*, 17 C. B. 177; *Leigh* v. *Baker*, 2 C. B. N. S. 367.)

A writ issued under this Act more than six months after the bill or note is due, though irregular, is not void, and the irregularity may be waived by the defendant. (*Malthy* v. *Munyells*, 5 H. & N. 813; 29 L. J. Ex. 377.) Or it may be amended by the Court or a judge (*Leigh* v. *Baker*, 2 C. B. N. S. 367).

Checks, although not expressly mentioned, are held to be within the provisions of the Act: *Eyre* v. *Waller*, 29 L. J. Ex. 246; 5 H. & N. 460.

If the writ includes several parties separately liable on the bill as the drawer and acceptor, and both obtain leave to appear, the plaintiff must declare separately against each, as if there had been several writs; if one only appears, the declaration must be against him only. If the parties are jointly liable as joint drawers or joint acceptors and all appear, they must be declared against jointly; but if one does not appear, as the statute, s. 6, provides that the C. L. P. Acts, 1852, 1854, shall extend and apply to proceedings under it, the plaintiff may sign judgment against the defendant who has not appeared, and issue execution thereon, abandoning his action against the other defendants, or he may declare against the other defendants, sug-

defendant to pay to the plaintiff £——, —— months after date (*a*); and the defendant accepted the said bill, but did not pay the same (*b*).

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gesting the judgment, and charging the contract as a joint contract as in the form, *ante*, p. 11.

By the R. G. H. T. 1853, it is ordered that where a defendant obtains leave to appear according to the said Act, and enters an appearance to the suit, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant for the bill of exchange or promissory note, and deliver a particular of demand accordingly. The insertion of any other counts in the declaration than those above allowed, would be an irregularity, which the defendant might object to before pleading.

A defendant who has obtained leave to appear is not restricted in his defence to the grounds taken in the affidavit. (*Saul* v. *Jones*, 28 L. J. Q. B. 37; El. & El. 59.)

By an order in Council of 30th Jan. 1856, the provisions of the Summary Procedure on Bills of Exchange Act, 1855, were extended to the County Courts. (See the Order in Pollock's 'Practice of the County Courts,' 3rd ed. App. 159.)

(*a*) Or "sight." As the fact of the acceptor having had sight of the bill (which means legal sight) is involved in the allegation of acceptance, this form requires no other modification to make it applicable in the case of a bill payable after sight. Legal sight is proved by acceptance or by protest for non-acceptance. (*Campbell* v. *French*, 6 T. R. 212.)

(*b*) Before the C. L. P. Act, 1852, when the form of action was stated in the writ, and shown by the peculiar frame of the declaration, and when different forms of action could not be joined, it was important to observe, that if the action was between *immediate* parties to a bill, namely, the drawer and acceptor, the payee and drawer, each indorsee and his immediate indorser, it might be either in debt or in assumpsit; but if it was between *remote* parties, that is to say, any others than those above mentioned, it could be in assumpsit only. The same rule affected actions on notes, where the *immediate* parties are the payee and maker, and each indorsee and his immediate indorser, all others being *remote* parties. These distinctions are now unimportant so far as regards declarations.

Counts should be added upon the consideration for the bill, when it can be proved independently of the bill. And the common count upon accounts stated should be added when it can be proved: the bill itself is evidence of an account stated between immediate parties to it. (*Early* v. *Bowman*, 1 B. & Ad. 892; and see *ante*, "*Accounts stated*," p. 44.)

Interest is claimable on bills of exchange and promissory notes by the custom of merchants from all the parties liable, although not expressed on the face of the bill or note. (*Windle* v. *Andrews*, 2 B. & Ald. 696.) It is recoverable as damages, and need not be charged in the declaration. The rate of interest allowed on inland bills and notes is £5 per cent., unless another rate is mentioned in the bill or note. (*Keane* v. *Keane*, 27 L. J. C. P. 88.) On foreign bills interest is recoverable at the rate of interest at the place where the bill was drawn, accepted, or indorsed, as the case may be, according to the liability of the party sued. (*Allen* v. *Kemble*, 6 Moore, P. C. 314; *Gibbs* v. *Fremont*, 9 Ex. 25.)

See the mode of stating bills drawn by a firm: *Kirk* v. *Blurton*, 9 M. & W. 284; *Ball* v. *Gordon*, 9 M. & W. 345; *Tigar* v. *Gordon*, 9 M. & W. 347; *Elsam* v. *Denny*, 15 C. B. 87. Where any of the parties are designated in the bill by the initial letter, or some contraction of the Christian name, it is sufficient in the declaration to follow the designation so used. (See 3 & 4 Will. IV. c. 42, s. 12, *ante*, p. 4.) In such case it was formerly necessary also to state in the declaration, that the party was so designated

The Expense of Noting may be laid as Special Damage by adding as follows (*a*):—

And by reason thereof the plaintiff incurred expenses in and about the presenting and noting of the said bill, and incidental to the dishonour thereof.

Drawer against Acceptor on a Bill payable to a third party.

That the plaintiff, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to *G. H.* or order £—— —— months after date; and the plaintiff delivered the said bill to the said *G. H.*, and the defendant accepted the said bill, but did not pay the same, whereupon the same was returned to the plaintiff.

Drawer against Acceptor on a Bill accepted payable at a particular place (*b*).

That the plaintiff, on the —— day of ——, A.D. ——, by his bill

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in the bill, in order to bring the case within the statute, otherwise the declaration was open to a special demurrer; this mode of objecting being abolished by the C. L. P. Act, 1852, such statement is no longer necessary. (*Miller* v. *Hay*, 3 Ex. 14; *Lomax* v. *Landells*, 6 C. B. 577.)

It is sometimes doubtful whether a document is a bill of exchange or a promissory note (*Shuttleworth* v. *Stephens*, 1 Camp. 407; *Allan* v. *Mawson*, 4 Camp. 115; *Miller* v. *Thompson*, 3 M. & G. 576; *Fielder* v. *Marshall*, 9 C. B. N. S. 606,) in which cases it may be found convenient to set out the document in the declaration verbatim with averments of identity between the names mentioned in it and the parties to the suit; so when there is any doubt as to the names or the character in which the parties are liable. (See a count in this form; *Price* v. *Taylor*, 29 L. J. Ex. 331; 5 H. & N. 540.)

(*a*) An inland bill is not commonly noted or protested. It is necessary that this should be done in those cases only where any of the parties are to be sued abroad. The expenses are not recoverable, unless charged as special damage. (*Rogers* v. *Hunt*, 10 Ex. 474; *Kendrick* v. *Lomax*, 2 C. & J. 407.) Under the Summary Procedure on Bills of Exchange Act, 1855, s. 5, the expenses of noting may be recovered in the same way as the amount of the bill.

(*b*) A bill accepted payable at a banker's or other place was, at common law, a qualified acceptance, and required a presentment according to the tenor of the acceptance. But the 1 & 2 Geo. IV. c. 78, after reciting "that according to law, where a bill is accepted, payable at a banker's, the acceptance is not a general but a qualified acceptance," enacts "that if any person shall accept a bill, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance; but if the acceptor shall, in his acceptance, express that he accepts the bill, payable at a banker's house or other place *only and not otherwise or elsewhere*, such acceptance shall be deemed and taken to be to all intents and purposes a qualified acceptance of such bill; and the acceptor shall not be liable to pay such bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."

Since the above statute, a bill accepted payable at a banker's or other place, without further restriction in the acceptance, is a general acceptance

of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff or order £—— —— months after date; and the defendant accepted the said bill, payable at Messieurs *G.* and *H.*, bankers, London, and not otherwise or elsewhere, and the said bill was duly presented for payment at Messieurs *G.* and *H.*, bankers, London, aforesaid, and was dishonoured.

Drawer against Acceptor on a Bill accepted payable on a contingency.

That the plaintiff, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff £—— —— months after date; and the defendant accepted the said bill, payable on the death of *G. H.*, and before action the said *G. H.* died; yet the defendant did not pay the said bill. [*A conditional acceptance cannot be declared upon as an absolute one, although the condition has been fulfilled.* (*Langston* v. *Carney*, 4 Camp. 176.)]

Count on an acceptance payable on giving up bills of lading of goods by a certain ship: Smith v. *Vertue*, 30 L. J. C. P. 56.

Payee against Acceptor.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff £—— —— months after date; and the defendant accepted the said bill, but did not pay the same (*a*). [*Forms by payee against acceptor on bills payable after sight, or accepted payable at a particular place, or contingently upon a particular event, may be readily framed from the above in conjunction with the preceding forms.*]

Indorsee against Acceptor.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the de-

as against the *acceptor*, and may be declared upon accordingly. (*Blake* v. *Beaumont*, 4 M. & G. 7; *Halstead* v. *Skelton*, 5 Q. B. 86.) A bill so accepted however, may also be validly presented at the place specified. (Ib.; *Wilmot* v. *Williams*, 7 M. & G. 1017; *Walter* v. *Cubley*, 2 C. & M. 151; *Shelton* v. *Braithwaite*, 8 M. & W. 252.) The effect of the statute is restricted to the acceptor: as against all other parties to the bill the qualifications of the acceptance remain the same as at common law; and the bill must be duly presented according to the qualifications of the acceptance in order to charge the drawer (see *Gibb* v. *Mather*, 8 Bing. 214, 220); or the indorser (*Saul* v. *Jones*, 28 L. J. Q. B. 37; El. & El. 59). The statute applies equally to bills in which the drawer, in making the bill, has, in the body of it, required payment to be made at a particular place; the acceptance is general as against the acceptor, unless it contains the negative expressions required by the statute. (*Selby* v. *Eden*, 3 Bing. 611; *Fayle* v. *Bird*, 6 B. & C. 531.)

(*a*) This form omits all mention of the delivery of the bill to the plaintiff or of his title to sue. This mode of pleading, however, is authorized by the C. L. P. Act, 1852, Sched. B. 18, and is in accordance with the case of *Churchill* v. *Gardner*, 7 T. R. 596.

fendant to pay to the said *G. H.* or order £—— —— months after date; and the defendant accepted the said bill, and the said *G. H.* indorsed the same [to *K. L.* who indorsed the same to *M. N.*, who indorsed the same] to the plaintiff; but the defendant did not pay the same (*a*).

Payee against Drawer, for default Acceptance. (*C. L. P. Act*, 1852, *Sched. B.* 18 (*b*).)

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and the said bill was duly presented for acceptance, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Indorsee against Drawer, for default Acceptance.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, directed to *G. H.*, required the said *G. H.*, to pay to *K. L.* or order £—— —— months after date; and the said *K. L.* indorsed

(*a*) The statement of the indorsement includes the delivery for the purpose of transfer (*Bird* v. *Hampshire*, 1 M. & W. 371), and imports the transfer of the property in and the right of action on the bill (*Marston* v. *Allen*, 8 M. & W. 494; *Law* v. *Parnell*, 29 L. J. C. P. 17; 7 C. B. N. S. 282; *Keane* v. *Beard*, 30 L. J. C. P. 287, 290;) but a statement of delivery merely would not include indorsement, and would render the count bad on general demurrer. (*Cunliffe* v. *Whitehead*, 3 Bing. N. C. 828.) The allegation of indorsement is sufficiently proved by a transfer of the property in the bill, although no right of action be given against the indorser by the transfer. (*Smith* v. *Johnson*, 27 L. J. Ex. 363; 3 H. & N. 222.) The delivery of a bill payable to his own order by the drawer to the plaintiff, without indorsement though with the intention of transferring the property in the bill, was held to give no authority to the plaintiff to indorse the drawer's name and no right of action against the acceptor. (*Harrop* v. *Fisher*, 30 L. J. C. P. 283.)

When a bill has been indorsed in blank its negotiability cannot afterwards be restricted by a special indorsement. (*Smith* v. *Clarke*, 1 Peake, N. P. C. 295; *Walker* v. *Macdonald*, 2 Ex. 527.) Hence the plaintiff may declare as the immediate indorsee of the first or any intermediate indorser. The indorsements not stated must be struck out at the trial, and the remedy against those indorsers is lost. Indorsements stated, though unnecessarily, must be proved if denied. (*Waynam* v. *Bend*, 1 Camp. 175.)

(*b*) This cause of action arises immediately upon the refusal to accept, and dates from that time. (*Whitehead* v. *Walker*, 9 M. & W. 506.) The presentment of the bill for acceptance and the notice of dishonour must be distinctly averred as essential to the cause of action; if they are excused on any grounds, the matter of excuse must be averred. (*Burgh* v. *Legge*, 5 M. & W. 421; see forms, *post* 81.) Mere delay in the notice when reasonable need not be stated or excused, but may be proved under the averment of due notice. (*Firth* v. *Thrush*, 8 B. & C. 387; *Lundie* v. *Robertson*, 7 East, 231.) Notice of dishonour by non-acceptance must be given at once, and cannot be reserved until default in payment. (*Bartlett* v. *Benson*, 14 M. & W. 733.) A bill payable after sight should be presented for acceptance within a reasonable time, otherwise any loss occasioned by the delay falls on the holder. (*Mellish* v. *Rawdon*, 9 Bing. 416; *Straker* v. *Graham*, 4 M. & W. 721.)

the said bill [to *M. N.* who indorsed the same] to the plaintiff, and the same was duly presented for acceptance, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Payee against Drawer, for default Payment (*a*).

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and the said bill was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Payee against Drawer, for default Payment, on a Bill drawn payable at a particular place.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff in London £—— —— months after date; and the said bill was duly presented for payment in London aforesaid, and was dishonoured, whereof the defendant had due notice, but did not pay the same (*b*).

Payee against Drawer, for default Payment, excusing Notice of Dishonour (*c*).

That the defendant, on the —— day of ——, A.D. ——, by his bill

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(*a*) This cause of action arises only when the bill has not been presented for acceptance, or has been accepted and payment refused. When acceptance has been refused no new cause of action can arise on non-payment. (*Whitehead* v. *Walker*, 9 M. & W. 506.) It is not necessary to state an acceptance, whether general or at a particular place, against any party except the acceptor. (*Park* v. *Edge*, 1 C. & M. 429.)

(*b*) A general averment that the bill was duly presented for payment would perhaps be sufficient, as in the last form. (*Lyon* v. *Holt*, 5 M. & W. 250; *Park* v. *Edge*, 1 C. & M. 429; but see *Boydell* v. *Harkness*, 3 C. B. 168.) Where a bill is drawn or accepted, payable at a particular place, the drawer or indorser can only be rendered liable upon presentment and dishonour at that place. (*Gibb* v. *Mather*, 8 Bing. 214; *Saul* v. *Jones*, 28 L. J. Q. B. 37.) A general acceptance of a bill drawn payable at a particular place renders the acceptor generally liable by force of the statute 1 & 2 Geo. IV. c. 78; *ante*, p. 78 (*a*); but does not enlarge or alter the liability of the drawer or indorser. (Ib.; *Taylor* v. *Bird*, 6 B. & C. 531.) A qualified acceptance of a bill drawn generally qualifies the liability of the drawer to the same extent, so that the bill must be presented according to the acceptance in order to charge the drawer (*Shelton* v. *Braithwaite*, 8 M. & W. 252); and so also with the indorser. (*Saul* v. *Jones*, 28 L. J. Q. B. 37.)

(*c*) Notice of dishonour is necessary for two reasons: first, because the person entitled to it may have effects in the hands of the parties dishonouring the bill, which he may wish to withdraw; secondly, because he may have a remedy upon the bill against other parties arising upon the dishonour which he may wish to enforce. (See authorities cited in notes to *Bickerdike* v. *Bollman*, 2 Smith's L. C. 5th ed. 43; where see also what excuses of notice of dishonour are sufficient, as showing that the defendant has not been damnified by the want of notice in either of the above respects.) In all cases where notice of dishonour is excused or dispensed with, the matter of

of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and the said bill was duly presented for payment and was dishonoured; and the said *G. H.* had not at any time any effects of the defendant, nor had the defendant at any time any reasonable ground to expect that the said *G. H.* would have any such effects or would pay the said bill, nor was there at any time any consideration or value for the payment thereof by the said *G. H.*, nor has the defendant sustained any damage by reason of not having notice of the dishonour of the said bill; yet the defendant has not paid the same.

Like counts: Fitzgerald v. *Williams*, 6 Bing. N. C. 68; *Terry* v. *Parker*, 6 A. & E. 502; *Kemble* v. *Mills*, 1 M. & G. 757; *Carter* v. *Flower*, 16 M. & W. 743.

Payee against Drawer, for default Payment, excusing Presentment because the Drawee could not be found.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and when the said bill became due the plaintiff made diligent search and inquiry for the said *G. H.* in order to present the said bill to him for payment, but the said *G. H.* could not be found, nor could his place of abode be discovered, nor did the said *G. H.* pay the said bill; and the defendant had due notice of the premises, but did not pay the said bill.

A like count excusing a delay in presentment on the ground that the defendant had no effects in the hands of the drawee: Terry v. *Parker*, 6 A. & E. 502. [*And see the last form, from which a count excusing presentment on this ground may be readily framed.*]

A like count excusing presentment of a note (held insufficient on special demurrer): Sands v. *Clarke*, 8 C. B. 751.

Payee against Drawer, for default Payment, where the Drawee was dead, and no Executor or Administrator appointed at the time the Bill became due.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said

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excuse or dispensation must be averred, and will not suffice, as evidence, to support a common averment of notice. (*Burgh* v. *Legge*, 5 M. & W. 418; and see *Rabey* v. *Gilbert*, 30 L. J. Ex. 170, 172.) The facts above pleaded form a good excuse for default in notice of dishonour, or in presentment as against the drawer of the bill, but not as against an indorser who has no notice of the facts. (*Saul* v. *Jones*, 28 L. J. Q. B. 37.) A delay in giving notice of dishonour, unavoidable or reasonable under the circumstances of the particular case, need not be excused, but may be averred as due notice of dishonour. (*Firth* v. *Thrush*, 8 B. & C. 387; *Lundie* v. *Robertson*, 7 East, 231; see *ante*, p. 80, n. (*a*). An acknowledgment of liability on the bill made by the defendant to a party to the bill other than the plaintiff, may be used by the plaintiff as evidence of notice of dishonour or waiver of such notice. (*Potter* v. *Rayworth*, 13 East, 417); as where the defendant suffered judgment by default in a prior action brought against him on the same bill, by a different holder. (*Rabey* v. *Gilbert*, 30 L. J. Ex. 170; 6 H. & N. 536.)

G. H. to pay to the plaintiff £—— —— months after date; and afterwards and before the said bill became due the said *G. H.* died, and when the said bill became due no person had become executor of any will of the said *G. H.*, or administrator of his estate or effects, and the said bill was duly presented for payment at the last place of abode of the said *G. H.*, but has not been paid; and the defendant had due notice of the premises, but did not pay the said bill.

Count alleging the death of the acceptor and presentment to his executor: Caunt v. *Thompson*, 7 C. B. 400.

Payee against Drawer, for default Payment, where the Defendant dispensed with Presentment.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and when the said bill became due the defendant requested the plaintiff not to present the said bill to the said *G. H.* for payment, and discharged the plaintiff from so presenting it, and the said *G. H.* has not paid the said bill, whereof the defendant had notice, but did not pay the same.

Indorsee against Drawer, for default Payment, on a Bill payable to the Drawer or order.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the defendant or order £—— —— months after date; and the defendant indorsed the same [to *J. K.*, who indorsed the same] to the plaintiff, and the said bill was duly presented for payment, and was dishonoured; whereof the defendant had due notice, but did not pay the same.

Indorsee against Drawer, for default Payment, on a Bill payable to a third Party or order.

That the defendant, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to *J. K.* or order £—— —— months after date; and the said *J. K.* indorsed the said bill [to *L. M.*, who indorsed the same] to the plaintiff, and the said bill was duly presented for payment, and was dishonoured; whereof the defendant had due notice, but did not pay the same.

Indorsee against Indorser, for default Acceptance.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *J. K.*, required the said *J. K.* to pay to the said *G. H.* or order £—— —— months after date; and the said *G. H.* indorsed the said bill to the defendant, who indorsed the same [to *L. M.*, who indorsed the same] to the plaintiff; and the said bill was duly presented for acceptance, and was dishonoured; whereof the defendant had due notice, but did not pay the same.

Indorsee against Indorser, for default Payment.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to *J. K.*, required the said *J. K.* to pay to the said *G. H.* or order £—— —— months after date; and the said *G. H.* indorsed the said bill to the defendant, who indorsed the same [to *L. M.*, who indorsed the same] to the plaintiff, and the said bill was duly presented for payment and was dishonoured; whereof the defendant had due notice, but did not pay the same (*a*).

Executor of Drawer against Acceptor.

(*Commence with the form, ante*, p. 12.) That the said *C. D.*, in his lifetime, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *C. D.*, £—— —— months after date; and the defendant then accepted the said bill, but has not paid the same.

Administrator of Drawer against Acceptor.

Commence with the form, *ante*, p. 14, and continue as in the last form.

Executor of Payee against Acceptor.

(*Commence with the form, ante*, p. 12.) That in the lifetime of the said *C. D.*, on the —— day of ——, A.D. ——, *J. K.*, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *C. D.* £—— —— months after date; and the defendant then accepted the said bill, but has not paid the same.

Executor of Indorsee against Acceptor.

(*Commence with the form, ante*, p. 12.) That in the lifetime of the said *C. D.*, on the —— day of ——, A.D. ——, *J. K.*, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *J. K.* or order £—— —— months after date; and the defendant then accepted the said bill, and the said *J. K.* indorsed the same [to *L. M.*, who indorsed the same] to the said *C. D.* in his lifetime; but the defendant has not paid the same.

Drawer against Executor of Acceptor.

(*Commence with one of the forms, ante*, p. 13.) That in the lifetime of the said *G. H.*, on the —— day of ——, A.D. ——, the plaintiff, by his bill of exchange, now overdue, directed to the said *G. H.*, required the said *G. H.* to pay to the plaintiff £—— —— months after date; and the said *G. H.* then accepted the said bill, but the same has not been paid.

(*a*) As to excuses for not giving notice of dishonour in this case, and the modes of pleading them, see *ante*, p. 81 (*b*). Upon a special acceptance the above form is sufficient; the manner and place of presentment is mere matter of evidence against any party but the acceptor. (*Park* v. *Edge*, 1 C. & M. 429; *Boydell* v. *Harkness*, 4 D. & L. 178; 3 C. B. 168. See *ante*, p. 81 (*a*).)

Drawer against Administrator of Acceptor.

Commence with the form, *ante*, p. 15, and continue as in the last form.

Indorsee of Executor of Drawer against Acceptor.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *G. H.* or order £—— —— months after date, and the defendant accepted the said bill; and the said *G. H.* afterwards died, having first duly made his will and appointed *J. K.* executor thereof, who afterwards, as and being such executor, indorsed the said bill to the plaintiff; but the defendant did not pay the same.

Indorsee of Administrator of Drawer against Acceptor.

That *G. H.*, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *G. H.* or order £—— —— months after date, and the defendant accepted the said bill; and the said *G. H.* afterwards died intestate, and thereupon administration of the personal estate and effects which were of the said *G. H.*, deceased, at the time of his death, was duly granted to *J. K.*, who as and being such administrator, indorsed the said bill to the plaintiff; but the defendant did not pay the same.

Assignees of a Bankrupt Drawer against Acceptor.

(*Commence with the form, ante*, p. 19.) That the said *E. F.*, before he became bankrupt, on the —— day of ——, A.D. ——, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *E. F.* £—— —— months after date; and the defendant then accepted the said bill, but has not paid the same.

Assignees of Drawer, an Insolvent Debtor, against Acceptor.

(*Commence with the form, ante*, p. 19.) That before the estate and effects of the said *E. F.* vested in the plaintiffs as assignees as aforesaid, on the —— day of ——, A.D. ——, the said *E. F.*, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *E. F.* £—— —— months after date; and the defendant then accepted the said bill, but has not paid the same.

Husband and Wife on a Bill drawn by her before Marriage against Acceptor (*a*).

(*Commence with the form, ante*, p. 17.) That the said *C.*, whilst

(*a*) A husband may sue alone in his own name on a bill of exchange made payable to his wife or order before the marriage, although not indorsed by her. (*M'Neilage* v. *Holloway*, 1 B. & Ald. 218.) But the assignees of a bankrupt husband cannot sue alone in their own names on a promissory

she was unmarried, on the —— day of ——, A.D. ——, by her bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said *C.* £—— —— months after date; and the defendant then accepted the said bill, but has not paid the same.

By husband and wife on a promissory note made to the wife during marriage: Philliskirk v. *Pluckwell*, 2 M. & S. 393.

By husband alone on a bill of exchange payable to the wife or order before marriage: M'Neilage v. *Holloway*, 1 B. & Ald. 218.

By husband alone on a promissory note payable to wife during marriage: Burrough v. *Moss*, 10 B. & C. 568.

Action by a widow on a note made payable to her during marriage: Richards v. *Richards*, 2 B. & Ad. 447; *Gaters* v. *Madeley*, 6 M. & W. 423.

Action by the administrator of a deceased wife upon a note given to her before marriage, and not reduced into possession by her husband during coverture: Hart v. *Stephens*, 6 Q. B. 937.

Drawer against a Husband and Wife on a Bill accepted by her before Marriage.

(*Commence with the form ante, p.* 17.) That whilst the said *G.* was unmarried, on the —— day of ——, A.D. ——, the plaintiff, by his bill of exchange, now overdue, directed to the said *G.*, required the said *G.* to pay to the plaintiff £—— —— months after date; and the said *G.* then accepted the said bill, but the same has not been paid.

Surviving Drawer against Acceptor.

(*Commence with the ordinary form, see ante, p.* 10. That the plaintiff and *G. H.*, since deceased, on the —— day of ——, A.D. ——, by their bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff and the said *G. H.* £—— —— months after date; and the defendant accepted the said bill, but did not pay the same.

Against a surviving Joint Acceptor.

The declaration in the commencement, body, and conclusion, may be in the ordinary form, see *ante*, p. 11; *Mountstephen* v. *Brook*, 1 B & A. 224.

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note made payable to the wife of the bankrupt before marriage. (*Sherrington* v. *Yates*, 12 M. & W. 855.) A husband may sue alone on a promissory note made payable to his wife during the marriage (*Burrough* v. *Moss*, 10 B. & C. 568); or may join with his wife in suing. (*Philliskirk* v. *Pluckwell*, 2 M. & S. 393.) A bill or note made payable to a wife survives to her on the death of her husband if he has not previously reduced it into possession. (*Gaters* v. *Madeley*, 6 M. & W. 423; *Howard* v. *Oakes*, 3 Ex. 136.) And upon her death passes to her administrator and not to her husband. (*Hart* v. *Stephens*, 6 Q. B. 937; and see *post*, "*Husband and Wife.*")

Foreign Bills of Exchange (*a*).

Drawer against Acceptor.

That the plaintiff, on the —— day of ——, A.D. ——, at [Paris, in the empire of France], by his foreign bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff —— [francs] —— months after date; and the defendant accepted the said bill, but did not pay the same.

Payee against Acceptor on a Bill drawn in Sets.

That *G. H.*, on the —— day of ——, A.D. ——, at [Paris, in the empire of France], by his foreign bill of exchange, now overdue, directed to the defendant, required the defendant to pay that, his first of exchange, (second and third not paid,) to the plaintiff, —— [francs] —— months after date; and the defendant accepted the said bill, but did not pay the same.

By Payer supra protest for honour of Drawer against Acceptor.

That *G. H.*, on the —— day of ——, A.D. at [Paris, in the empire of France], by his foreign bill of exchange, now overdue, directed to the defendant, required the defendant to pay to *J. K.* or order, —— [francs] —— months after date; and the defendant accepted the said bill, and the said *J. K.* indorsed the same to *L. M.*, who indorsed the same to *N. O.*, and the said bill was presented to the defendant for payment and was dishonoured, and was duly protested for non-payment; and thereupon afterwards the plaintiff, according to the custom of merchants, for the honour of the said drawer upon protest duly made in that behalf, paid to the last-mentioned indorsee, then being the holder of the said bill, the amount of the said bill, together with certain reasonable and necessary charges of and attending the said presentment and protest, amounting to £——, of all which the defendant had due notice, yet the defendant did not pay the said bill or the said money so paid by the plaintiff.

Like counts: Cox v. *Earle*, 3 B & Ald. 430; *Geralopulo* v. *Wieler*, 10 C. B. 690; *and see Ex. p. Wyld*, 30 L. J. B. 10.

(*a*) As to foreign bills, see Byles on Bills, 7th ed. ch. 31, 32; and see the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, ss. 6, 7. It is necessary to state in the declaration that the bill is a foreign bill. (*Armani* v. *Castrique*, 13 M. & W. 443.) If it purport to be drawn abroad, and was not so in fact, and was not properly stamped, even a *bonâ fide* holder for value cannot recover upon it. (*Steadman* v. *Duhamel*, 1 C. B. 888.)

The expenses of noting and protesting, if sought to be recovered, must be laid as special damage, *ante*, p. 77. Interest on foreign bills is calculated according to the rate at the place where they are drawn, accepted, or indorsed, as the case may be, according to the liability of the party sued. (*Allen* v. *Kemble*, 6 Moore, P. C. 314; *Gibbs* v. *Fremont*, 9 Ex. 25; and *see ante*, p. 77.)

Foreign bills drawn or negotiated within the United Kingdom must be stamped under the 17 & 18 Vict. c. 83, ss. 3–6; and see 24 & 25 Vict. c. 91, s. 33; *Pooley* v. *Brown*, 31 L. J. C. P. 134.

Payee against Acceptor supra Protest (a).

That *G. H.*, on the —— day of ——, A.D. ——, at [Paris, in the empire of France], by his foreign bill of exchange, now overdue, directed to *J. K.*, required the said *J. K.* to pay to the plaintiff —— [francs] —— months after date; and the said bill was duly presented to the said *J. K.* for acceptance, and he refused to accept the same, whereupon the said bill was duly protested for non-acceptance thereof, of all which the defendant had due notice, and thereupon the defendant accepted the said bill under the said protest, and the said bill was duly presented to the said *J. K.* for payment when it became due, and he did not pay the same, whereupon the said bill was duly protested for non-payment thereof; of all which the defendant had due notice, but did not pay the said bill.

A like count: Williams v. *Germaine*, 7 B. & C. 468.

Count on a conditional acceptance under protest: Mitchell v. *Baring*, 10 B & C. 4.

Indorsee against Acceptor on a Foreign Bill payable at Usances (b).

That *G. H.*, on the —— day of ——, A.D. ——, at [Vienna, in the empire of Austria], by his foreign bill of exchange, now overdue, directed to the defendant, required the defendant to pay to *J. K.* or order —— [thalers] at —— usances; and the said *J. K.* indorsed the said bill to the plaintiff, and the defendant accepted the said bill, but did not pay the same.

Payee against Drawer, for default Acceptance.

That the defendant, on the —— day of ——, A.D. ——, at [Paris, in the empire of France], by his foreign bill of exchange, directed to *G. H.*, required the said *G. H.* to pay to the plaintiff —— [francs] —— months after date; and the said bill was duly presented for acceptance, and was dishonoured, whereupon the said bill was duly protested for non-acceptance thereof, of all which the defendant had due notice, but did not pay the said bill; and by reason of the premises the plaintiff incurred expenses in and about the presenting, noting, protesting, and re-exchange of the said bill, and incidental to the dishonour thereof.

Indorsee against Drawer, for default Payment.

That the defendant, on the —— day of ——, A.D. ——, at [Paris, in the empire of France], by his foreign bill of exchange, now overdue, directed to *G. H.*, required the said *G. H.* to pay to the defendant or order —— [francs] —— months after date, and the defendant indorsed the said bill to the plaintiff, and the said bill was duly presented for payment, and was dishonoured, whereupon the same was duly protested for non-payment thereof, of all which the defendant had due notice, but did not pay the said bill.

(*a*) To support this action, a protest for non-acceptance and also a protest for non-payment are necessary. (*Hoare* v. *Cazenove*, 16 East, 391; *Williams* v. *Germaine*, 7 B. & C. 468.)

(*b*) See a list of usances between different places, Byles on Bills, 7th ed. p. 175; Chitty on Bills, 10th ed. 255.

Like count by indorsee against indorser: Suse v. *Pompe*, 30 L. J. C. P. 75 (*a*).

Bankers' Checks (*b*).

Payee of Check against Drawer.

That the defendant, on the —— day of ——, A.D. ——, by his check or order for the payment of money, directed to Messieurs *G. H.* & Co., bankers, required them to pay to the plaintiff or bearer £——, and delivered the said check to the plaintiff, and the same was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Count on a check excusing notice of dishonour on the ground that the drawer had no effects in the hands of the drawee: Kemble v. *Mills*, 1 M. & G. 757; *and see form, ante, p.* 81.

Bearer or Indorsee of Check against Drawer (*b*).

That the defendant, on the —— day of ——, A.D. ——, by his check or order for the payment of money, directed to Messieurs *G. H.* & Co., bankers, required them to pay to *J. K.* or bearer [*or* order] £——, and the plaintiff became the bearer of the said check [*or* and the said *J. K.* indorsed the said check to the plaintiff], and the same was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same [*see ante, p.* 80 (*c*)].

Indorsee of Check against Indorser (*d*).

That *G. H.*, on the —— day of ——, A.D. ——, by his check or

(*a*) The amount for which the drawer or indorser of a foreign bill drawn or indorsed in England, and payable abroad, is liable upon dishonour by non-payment, is only the re-exchange, that is, the value of the foreign money at the rate of exchange on the day of dishonour, with interest and expenses; and evidence of a custom of merchants for the holder to have the option of recovering the sum he gave for the bill in England was held inadmissible as being inconsistent with the bill. (*Suse* v. *Pompe*, 30 L. J. C. P. 75.)

(*b*) Bankers' checks are within the Bills of Exchange Act. (*Eyre* v. *Waller*, 29 L. J. Ex. 246; 5 H. & N. 460.) As to the proceedings under this Act, see *ante*, p. 75 (*b*).

(*c*) The check should be presented within a reasonable time, after which time the bearer holds it at his own risk against the insolvency of the banker. The day after the receipt of the check is held to be the reasonable time given to the bearer for presentment; but if no loss is occasioned by holding it, the drawer remains liable for any length of time within six years. (*Alexander* v. *Burchfield*, 7 M. & G. 1061; *Robinson* v. *Hawksford*, 9 Q. B. 52; *Laws* v. *Rand*, 27 L. J. C. P. 76.) The same rule applies between the holder of a check and his banker or agent to whom it is delivered for presentment, in the absence of any stipulation to the contrary. (*Rickford* v. *Ridge*, 2 Camp. 537; *Hare* v. *Henty*, 30 L. J. C. P. 302; 10 C. B. N. S. 65.)

(*d*) Although the check is drawn payable "to bearer," it may be in-

order for the payment of money, directed to Messieurs *J. K.* & Co., bankers, required them to pay to *L. M.* or order £——, and the said *L. M.* indorsed the said check to the defendant, who indorsed the same [to *N. O.*, who indorsed the same] to the plaintiff, and the said check was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

A like count: Keene v. *Beard*, 29 L. J. C. P. 287; 8 C. B. N. S. 372.

Bearer of a Crossed Check against Drawer. (*a*).

That the defendant, on the —— day of ——, A.D. ——, by his check or order for the payment of money, directed to Messieurs *G. H.* & Co., bankers, required the said Messieurs *G. H.* & Co. to pay to *J. K.* or bearer £——, and the said check before presentment for payment was duly crossed with the name of Messieurs *L. M.* and Co., bankers [*or* with two transverse lines with the words "and Company," or an abbreviation thereof], and the plaintiff afterwards became the bearer of the said check, and the same was duly presented by and through the said Messieurs *L. M.* and Co., bankers [*or* by and through a banker] for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same.

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dorsed so as to make the indorser liable. (*Keene* v. *Beard*, 8 C. B. N. S. 372; 29 L. J. C. P. 287.) The count is erroneously given in the latter report, as it does not show that the check was "indorsed."

(*a*) Before the recent statutes relating to crossed checks, it was held that the crossing of a check did not restrict its negotiability to bankers only; but that the circumstance of a banker paying a crossed check otherwise than through a banker would be strong evidence of negligence against him if the person to whom he paid it was not the lawful holder. (*Bellamy* v. *Marjoribanks*, 7 Ex. 389; *Carlon* v. *Ireland*, 25 L. J. Q. B. 113; 5 E. & B. 765.) The statute 19 & 20 Vict. c. 25 enacted that the crossing of a check "shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." Under this statute it was held that the crossing formed no part of the check and might be altered or erased without forgery, and that if the crossing made by the drawer was erased by a subsequent holder, and the check presented without the crossing, the banker was justified in paying it otherwise than to or through a banker. (*Simmonds* v. *Taylor*, 27 L. J. C. P. 45, 248; 4 C. B. N. S. 463.) Now by the statute 21 & 22 Vict. c. 79, s. 1, it is enacted that the crossing shall be deemed a material part of the check, and shall not be obliterated, added to, or altered by any person after the issuing thereof, except that by sect. 2, where the check has been issued uncrossed or crossed with the words "and company," and without the name of any banker, any lawful holder may cross it with the name of a banker; and the banker upon whom such check is drawn shall not pay such check to any other than the banker with whose name such check shall be crossed, or if crossed without a banker's name to any other than a banker. And sect. 4 protects the banker from any liability by reason of paying to a person other than a banker, a check which does not, when presented, plainly appear to be or to have been crossed, or to have been obliterated, added to, or altered, unless such banker shall have acted *malâ fide* or been guilty of negligence in so paying such check.

As the last-mentioned Act makes the crossing a material part of the check, it seems proper to declare in the above form.

Promissory Notes.

Payee against Maker. (*C. L. P. Act*, 1852, *Sched. B.* 15.)

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to the plaintiff £—— —— months after date, but did not pay the same.

Count on a promissory note setting it out verbatim with averments of identity between the names on the note and the parties to the action: Price v. *Taylor*, 29 L. J. Ex. 331; 5 H. & N. 540.

Payee against Maker on a Note payable on demand (*a*).

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, promised to pay to the plaintiff on demand £——, but did not pay the same.

Payee against Maker on a Note payable after Notice (*b*).

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, promised to pay to the plaintiff £—— —— months after notice, and notice was afterwards given by the plaintiff to the defendant to pay the same —— months after the said notice, and the said time for payment elapsed before action, but the defendant did not pay the same.

Payee against Maker on a Note made payable at a particular Place in the body of it (*c*).

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to the plaintiff at Messieurs *G. H.* and Co., Lombard Street, London, £—— —— months after date, and the said note was duly presented for payment at Messieurs *G. H.* and Co., Lombard Street, London, aforesaid, but has not been paid.

(*a*) A note payable on demand is a present debt, and is due and payable at once without demand; and the statute of limitations runs from the date of the note. (*Norton* v. *Ellam*, 2 M. & W. 461.) But such a note is intended as a continuing security, and is not considered as overdue, so as to affect an indorsee with its equities. (*Brooks* v. *Mitchell*, 9 M. & W. 15.) It is within the Summary Procedure on Bills of Exchange Act, 1855, and the six months provided for suing under that Act reckons from the date of the note. (*Maltby* v. *Murrells*, 29 L. J. Ex. 377; 5 H. & N. 813.)

(*b*) In this case notice must be given; so where a note is payable at or after sight, a presentment for sight is necessary. (*Dixon* v. *Nuttall*, 1 C. M. & R. 307.)

(*c*) The presentment at the specified place is necessary, and must be averred. (*Spindler* v. *Grellett*, 1 Ex. 384; *Emblin* v. *Dartnell*, 12 M. & W. 830; *Sanderson* v. *Bowes*, 14 East, 500.) A memorandum of the place of payment in the margin of the note has not the same restrictive effect. (*Exon* v. *Russell*, 4 M. & S. 505; *Williams* v. *Waring*, 10 B. & C. 2.) It is not sufficient excuse of presentment that the defendant has absconded and not left any effects at the place specified. (*Sands* v. *Clarke*, 8 C. B. 751.)

Payee against Maker on a Note payable by Instalments where the whole Sum is due (a).

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, promised to pay to the plaintiff the sum of £——, in manner following, namely, £—— on the —— day of ——, £—— on the —— day of ——, and the remainder of the said sum on the —— day of —— respectively in the year aforesaid; all which periods elapsed before action, but the defendant did not pay the said note, or any part thereof.

Payee against Maker where some only of the Instalments are due.

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, promised to pay to the plaintiff the sum of £——, in manner following, namely, £—— on the —— day of ——, £—— on the —— day of ——, and the remainder of the said sum on the —— day of —— respectively in the year aforesaid, and the periods for payment of the said first and second instalments elapsed before action, but the defendant did not pay the same, or either of them.

Count by husband and wife on a note payable by instalments, where some became due before the marriage and some after: Spindler v. *Grellett*, 1 Ex. 384.

Payee against Maker on a Note payable by Instalments in which the whole Sum is made payable on Default of Payment of any of the Instalments.

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, promised to pay to the plaintiff the sum of £——, in manner following, namely, £—— on the first day of —— then next ensuing, and £—— on the first day of each succeeding month until the whole of the said sum should be fully paid, and that in case default should be made in payment of any of the said instalments, the whole of the said sum of £—— remaining unpaid at the time of such default should become immediately payable; and default was made by the defendant in payment of the [first] of the said instalments, whereupon the whole of the said sum of £—— then remaining unpaid became immediately payable, and the defendant has not paid the same.

A like count by an indorsee: Carlon v. *Kenealy*, 12 M. & W. 139.

Bearer against Maker on a Note payable to Bearer (b).

That the defendant, on the —— day of ——, A.D. ——, by his

(a) A note payable by instalments is assignable within the statute 3 & 4 Anne, c. 9, and the maker is entitled to the days of grace upon the falling due of each instalment. (*Oridge* v. *Sherborne*, 11 M. & W. 374; *Carlon* v. *Kenealy*, 12 M. & W. 139.)

(b) A note drawn by the defendant, payable to his own order, is not a negotiable note within the 3 & 4 Anne, c. 9, until it is indorsed. If it is indorsed in blank it becomes a note payable to bearer, and must be declared on as such in the above form. (*Hooper* v. *Williams*, 2 Ex. 13; *Brown* v. *De Winton*, 6 C. B. 336; *Flight* v. *Maclean*, 16 M. & W. 51.) If specially indorsed, it becomes a note payable to the indorsee or order, and should be so declared upon. (*Gay* v. *Lander*, 6 C. B. 336.) As in the form *post*, 93.)

promissory note, now overdue, promised to pay to *G. H.*, or bearer, £—— —— months after date, and the plaintiff became the bearer of the said note, but the defendant did not pay the same.

Count against the Bank of England on one of their notes: Raphael v. *Bank of England*, 17 C. B. 161.

Bearer against Maker on a Country Bank-note payable in Town or Country.

That the defendants, on the —— day of ——, A.D. ——, by their promissory note, promised to pay the bearer on demand £—— at the —— bank at ——, or at Messrs. *G. H.* and Co., bankers, London, and the plaintiff became the bearer of the said note, and the same was duly presented for payment at the —— bank at —— aforesaid [*or* at the said Messrs. *G. H.* and Co., bankers, London, aforesaid], but has not been paid.

Count on a debenture given by a company with interest warrants annexed: Enthoven v. *Hoyle*, 13 C. B. 373.

Indorsee against Maker.

That the defendant, on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to *G. H.* or order, £—— —— months after date, and the said *G. H.* indorsed the said note [to *J. K.*, who indorsed the same] to the plaintiff, but the defendant did not pay the same.

Indorsee against Payee. (*C. L. P. Act*, 1852, *Sched. B.* 16.)

That *G. H.* on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to the defendant or order, £—— —— months after date: and the defendant indorsed the same [to *J. K.*, who indorsed the same] to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same. [*As to the excuses for notice of dishonour, and the mode of averring them, see ante*, p. 81.]

Indorsee against Indorser.

That *G. H.*, on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to *J. K.* or order, £—— —— months after date; and the said *J. K.* indorsed the same to the defendant, who indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same.

Executor or Administrator of Payee against Maker.

(*Commence with one of the forms, ante*, p. 12.) That in the lifetime of the said *C. D.*, on the —— day of ——, A.D. ——, the defendant, by his promissory note, now overdue, promised to pay to the said *C. D.* £—— —— months after date, but did not pay the same.

Payee against the Executor or Administrator of Maker.

(*Commence with one of the forms, ante*, p. 13.) That the said *G. H.*, in his lifetime, on the —— day of ——, A.D. ——, by his promissory note, now overdue, promised to pay to the plaintiff £—— —— months after date, but the same has not been paid.

Assignees of a Bankrupt Payee against Maker.

(*Commence with the form, ante*, p. 19.) That before the said *E. F.* became bankrupt, on the —— day of ——, A.D. ——, the defendant, by his promissory note, now overdue, promised to pay to the said *E. F.* £—— —— months after date, but did not pay the same.

Husband and Wife, on a Note payable to her before Marriage, against Maker (*a*).

(*Commence with the form, ante*, p. 17.) That whilst the said *C.* was unmarried, on the —— day of ——, A.D. ——, the defendant, by his promissory note, now overdue, promised to pay to the said *C.* £—— —— months after date, but did not pay the same.

Payee against a Husband and Wife, on a Note made by her before Marriage.

(*Commence with the form, ante*, p. 17.) That the said *G.* whilst she was unmarried, on the —— day of ——, A.D. ——, by her promissory note, now overdue, promised to pay to the plaintiff £—— —— months after date, but the same has not been paid.

Surviving Payee against Maker.

(*Commence with the ordinary form, see ante*, p. 10.) That the defendant, on the —— day of ——, A.D. ——, and in the lifetime of *G. H.*, since deceased, by his promissory note, now overdue, promised to pay to the plaintiff and the said *G. H.* £—— —— months after date, but did not pay the same.

Payee against the surviving Maker.

The declaration may be in the ordinary form, see *ante*, p. 11.

Miscellaneous Counts relating to Bills.

For the Breach of a Promise to retire a Bill at maturity in consideration of a Renewal.

That in consideration that the plaintiff would accept and deliver

(*a*) As to actions by and against husband and wife on promissory notes, see *ante*, pp. 85, 86; and see *post*, "Husband and Wife."

to the defendant a bill of exchange, dated the —— day of ——, A.D. ——, drawn by the defendant upon the plaintiff, requiring him to pay to the defendant or order, £—— —— months after date, for the purpose of retiring another bill of exchange, dated the —— day of ——, A.D. ——, drawn by the defendant upon and accepted by the plaintiff for £——, payable to the defendant or order, —— months after date, the defendant promised the plaintiff to retire the last-mentioned bill; and the plaintiff thereupon accepted and delivered to the defendant, and the defendant received from the plaintiff the first-mentioned bill, for the purpose and on the terms aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said bill, dated —— day of ——, A.D. ——, retired; yet the defendant did not retire the same, whereby the plaintiff was obliged to pay to *G. H.*, as and being the indorsee and holder of that bill, the amount of the money payable thereby, and interest thereon, and the costs of an action brought by him against the plaintiff for the recovery of the same, and incurred expense in appearing to, defending, and settling the said action.

Against a Person entrusted with a Bill to Discount for Negotiating the same for his own Use.

That the plaintiff delivered to the defendant a bill of exchange of the plaintiff, dated the —— day of ——, A. D. ——, drawn by *G. H.* upon and accepted by the plaintiff, for £——, payable to the order of the said *G. H.* three months after date, and indorsed in blank by him, to be discounted by the defendant for the plaintiff on the terms that the defendant should, within a reasonable time in that behalf, pay over to the defendant the proceeds of such discounting, and the defendant received the said bill from the plaintiff for the purpose and on the terms aforesaid; yet the defendant did not discount the said bill for the plaintiff and pay over to him the proceeds of such discounting, although a reasonable time for him so to do elapsed before action, and the defendant wrongfully negotiated the said bill for his own benefit and applied to his own use the proceeds thereof; whereby the plaintiff was afterwards compelled to pay the said bill and interest thereon, and the costs of an action brought thereon by the holder of the said bill against the plaintiff as such acceptor as aforesaid, and became liable to pay the costs of defending the said action.

Count for not discounting or returning a bill delivered to the defendant to get discounted: Mullett v. *Huchison*, 7 B. & C. 639.

Against a person employed to discount a bill for not applying the proceeds as agreed upon: Alder v. *Keighley*, 15 M. & W. 117; *Hart* v. *Miles*, 27 L. J. C. P. 218; 4 C. B. N. S. 371.

Against a Person employed to take up a Bill of Exchange for Neglecting to do so.

That in consideration that the plaintiff would deliver to the defendant £—— for the purpose and on the terms hereinafter mentioned, the defendant promised the plaintiff to pay the said £—— to *G. H.*, and to obtain from him and deliver to the plaintiff a bill of exchange bearing date the —— day of ——, A. D. ——, drawn by

the plaintiff on and accepted by *K. L.* for the plaintiff's accomodation for £—— payable to the plaintiff's order —— months after date, and which bill had been indorsed by the plaintiff to the said *G. H.*; and the plaintiff delivered the said £—— to the defendant accordingly for the purpose and on the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said promise of the defendant performed by him and to maintain this action for the breach thereof by the defendant hereinafter alleged; yet the defendant did not obtain from the said *G. H.* and deliver to the plaintiff the said bill, and by reason thereof the plaintiff lost the said £——, and as drawer and indorser of the said bill as aforesaid, was afterwards obliged to pay to —— the holder thereof the amount of the said bill and interest thereon, and the costs of an action brought by the said holder against the plaintiff as such drawer and indorser thereof, and also incurred costs in defending and settling the said action.

BILLS OF LADING. *See* CARRIERS BY WATER.

BOARD AND LODGING. *See* LANDLORD AND TENANT.

BONDS (*a*).

(*a*) *Bonds.*]—By the common law, the whole penalty of a bond was recoverable upon a breach of the condition. The Court of Chancery, however, gave relief against the judgment at law, upon payment of the amount really due, or the damages arising from the breach of the condition. A power of granting similar relief in certain cases was afterwards given to the courts of law by statute.

Thus actions upon *common money bonds* are subject to the provisions of the statute 4 & 5 Anne, c. 16. By sect. 12 of that statute, where an action is brought upon any bond which has a condition to make void the same upon payment of a lesser sum at a day or place certain, if the obligor has, before the action brought, paid to the obligee the principal and interest due by the condition of such bond, though such payment was not made strictly according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition, and had been so pleaded. By sect. 13, power is given to the defendant, pending the action, to bring into court the principal and interest due on the bond, with such costs as have been expended in any suit in law or equity upon such bond, in full satisfaction and discharge of the bond; and the court may give judgment to discharge the defendant from the same accordingly. The payment into court under this section could not be pleaded. (*England* v. *Watson*, 9 M. & W. 333; and see *Hodgkinson* v. *Wyatt*, 1 D. & L. 668; *The Bishop of London* v. *M'Niel*, 23 L. J. Ex. 111.) But now by the C. L. P. Act, 1860, s. 25, payment into court may be pleaded to money bonds by leave of the court or a judge. And see *post*, "*Payment into Court.*"

Bonds with *special conditions* are subject to the provisions of the statute

8 & 9 Will. III. c. 11. By sect. 8 of this statute it is enacted, that in all actions upon any bond or on any penal sum for non-performance of any covenants or agreements in any deed or writing contained, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages and costs of suit as were before usually done, but also damages for such of the said breaches as the plaintiff shall prove to have been broken; and that the like judgment shall be entered on the verdict as before had been usually done in such actions: and that if judgment shall be given for the plaintiff on demurrer, or by confession, or nil dicit, he may suggest upon the roll as many breaches as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury before the justice or justices of assize (or now by the 3 & 4 Will. IV. c. 42, s. 16, before the sheriff), to inquire of the truth of those breaches, and to assess the damages that the plaintiff shall have sustained thereby. The section then provides, that in case the defendant shall pay into court the damages assessed for the breaches, a stay of execution shall be entered; or if the plaintiff is satisfied by execution, the defendant shall be thereby discharged; but, notwithstanding, in each case the judgment shall remain as a security against any further breaches, upon which the plaintiff may have a scire facias. Accordingly the judgment is entered in the usual form for the whole penalty and costs, with the addition, "that the plaintiff have execution against the defendant of the damages aforesaid to £—— by the jury assessed, according to the statute." (See form, Chit. Forms, 9th ed. 256.) The provisions of this Act, respecting the assignment and suggestion of breaches, and the judgment for the penalty as a security for further breaches, are not affected by the C. L. P. Act, 1852, see sect. 96.

The distinction between common money bonds, within the 4 & 5 Anne, c. 16, and bonds with special conditions, within the 8 & 9 Will. III. c. 11, is discussed in the judgment of the court in *Smith* v. *Bond*, 10 Bing. 125; and in 2 Wms. Saund. 187, n (2); and see 2 Chit. Pr. 11th ed. 996.

Covenants and agreements in writing containing a penal sum for non-performance are regulated by this statute. (1 Wms. Saund. 58; and see per Bramwell, B., *Betts* v. *Burch*, 4 H. & N. 506, 510; 28 L. J. Ex. 267, 269.)

As to *bail-bonds*, and the summary jurisdiction of the courts in respect of them, see 4 & 5 Anne, c. 16; forms, *ante*, 69; and as to *replevin bonds*, see 19 & 20 Vict. c. 108, s. 70; and, under the former practice, 11 Geo. II. c. 19, s. 23; forms, *post*.

In suing upon a *common money bond*, it is sufficient to declare for the penalty without assigning any breach of the condition.

In suing upon a *bond within* the 8 & 9 Will. III. c. 11, there are two courses open to the plaintiff. (2 Wms. Saund. 187 *a*, *b*; *Webb* v. *James*, 8 M. & W. 645.) The count may be framed for the penalty only without mentioning the condition, or assigning any breach of it; or the condition may be set out and breaches of it assigned in the declaration. In the former case, the defendant, if it be necessary for his defence, may set out the condition in his plea and aver performance thereof, or any matter he may have to adduce in excuse of performance. Assuming him to plead performance, the performance may, in some cases, be pleaded generally; and then it devolves upon the plaintiff to assign in his replication the breaches on which he relies. (2 Wms. Saund. 187, a, b, n. (f); 1 Wms. Saund. 116, n. (1).) Or the performance may be pleaded with particularity according to the terms of the condition; and then it is sufficient for the plaintiff in his replication to take issue on the performance, or such portion of it as he disputes. (*De la Rue* v. *Stewart*, 2 B. & P. N. R. 362.) As to when performance may be pleaded generally, see *post*, Chap. V. "*Bonds*."

If instead of pleading performance in either form, the defendant pleads some plea in excuse or otherwise, on which the plaintiff must necessarily take issue, then he will be obliged, in pursuance of the statute, to *suggest*

On a Bond, without assigning a Breach (*a*).

That the defendant, by his bond, bearing date the —— day of ——, A. D. ——, became bound to the plaintiff in the sum of £——, to be paid by the defendant to the plaintiff.

A like count against a company: Royal British Bank v. *Turquand*, 5 E. & B. 258.

A like count by administrator of obligee against two survivors of three joint obligors: Ashbee v. *Pidduck*, 1 M. & W. 564.

A like count against an heir on the bond of his ancestor: see post, "*Heir*," p. 145.

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upon the record, after the joinder of issue, all the breaches upon which he intends to rely. This same course of *suggesting* the breaches will also have to be adopted in the events of his obtaining judgment upon demurrer, or by default, whenever the breaches have not been assigned in the declaration or replication by any of the above means. (*Homfray* v. *Rigby*, 5 M. & S. 60; *Lawes* v. *Shaw*, 5 Q. B. 322; *Webb* v. *James*, 8 M. & W. 645.) And the statute in this respect is compulsory, *i. e.* the plaintiff must either assign or suggest breaches, as the case may be, and can only recover damages for the breaches assigned or suggested. (*Roles* v. *Rosewell*, 5 T. R. 538; *Hardy* v. *Bern*, 5 T. R. 636; *Walcot* v. *Goulding*, 8 T. R. 126.) If the defendant pleads performance as to part of the condition, and matter of excuse to other part, the plaintiff's proper course is to assign breaches in his replication to the former, and to take issue and enter a suggestion of breaches as to the latter. (*Webb* v. *James*, 8 M. & W. 645.)

It is now considered the best course in all cases to assign the breaches in the declaration, because they are admitted by a judgment by default, or on demurrer; whereas the breaches suggested must be proved. (*Barwise* v. *Russell*, 3 C. & P. 608; *Scott* v. *Staley*, 4 Bing. N. C. 724; *Quin* v. *King*, 1 M. & W. 42.) Before the C. L. P. Act, 1852, enabled the defendant to plead several matters by way of rejoinder, there was an advantage in reserving the assignment of breaches to the replication, as the defendant was thereby restricted to a single answer to each breach. The breaches are also admitted where they are assigned in the replication, and there is afterwards a judgment of nil dicit. (*Lawes* v. *Shaw*, 5 Q. B. 322.)

At common law the plaintiff could only assign a single breach, whether in the declaration or in the replication, otherwise his pleading was open to the objection of duplicity; because he claimed the same thing, viz. the penalty, in respect of each breach. (*Manser's* Case, 2 Co. Rep. 4 *a*; *Cornwallis* v. *Savery*, 2 Burr. 773.) But the above statute, 8 & 9 Will. III. c. 11, enables him to assign as many breaches as he shall think fit.

On an inquiry to assess damages upon the suggestion of breaches, the defendant cannot set up any matters in excuse or justification of the breaches; all such matters must be pleaded. (*Abp. Canterbury* v. *Robertson*, 1 C. & M. 690.)

As to the proceedings by scire facias on the judgment to recover for further breaches, see 2 Chit. Pr. 11th ed. 1003; see form, Chit. Forms, 9th ed. 526; *Tabor* v. *Edwards*, 27 L. J. C. P. 183. It is important to remark, that the plaintiff cannot, on a scire facias, suggest any breach which he might have originally assigned or suggested. (2 Wms. Saund. 189 *c*, n. 9.)

(*a*) This form is proper for a common money bond under 4 & 5 Anne, c. 16; and for a bond with a special condition under 8 & 9 Will. III. c. 11, where the plaintiff reserves the breaches for the replication, or for a suggestion under the statute, *supra*, 97. In declaring upon a bond it is not necessary to aver a breach in the non-payment of the money. It is sufficient for the plaintiff to state the debt under the bond; and it lies upon the defendant to discharge himself. (*Ashbee* v. *Pidduck*, 1 M. & W. 564.)

On an Annuity Bond, stating the Condition and assigning a Breach (a).

That the defendant, by his bond, bearing date the —— day of ——, A. D. ——, became bound to the plaintiff in the sum of £——, to be paid by the defendant to the plaintiff, subject to a condition that if the defendant should pay to the plaintiff £—— half-yearly, on the —— day of —— and the —— day of —— in every year during the life of the plaintiff, the said bond should be void; and afterwards on the —— day of ——, A. D. ——, the sum of £——, for —— of the said half-yearly payments of the said annuity, became due to the plaintiff, and is still unpaid.

Count against a surety on an annuity bond assigning breaches: White v. *Corbett*, 28 L. J. Q. B. 228; 1 E. & E. 692.

On a Bond with a special Condition, setting out the Condition and assigning Breaches.

That the defendant, by his bond, bearing date the —— day of ——, A. D. ——, became bound to the plaintiff in the sum of £——, to be paid by the defendant to the plaintiff, subject to a condition, whereby, after reciting that [*here state the material recitals, if any, in the condition,*] the condition of the said bond was declared to be that if [*here state the condition:*] then the said bond should be void; and [*here assign the breaches in respect of which the plaintiff seeks to recover damages. It is often advisable where there are several breaches to introduce the second and subsequent ones by saying,* and for a second [*or* third, *etc.*] breach the plaintiff says: *this affords great facility to the defendant in pleading to the breaches, and, where they are not otherwise distinctly marked, prevents his being obliged to point his pleas by an introductory repetition of the matter to which they are pleaded.*]

On a bond given under 1 *&* 2 *Vict. c.* 110, *s.* 8: *Hinton* v. *Acraman*, 2 C. B. 367; *Hayward* v. *Bennett*, 3 C. B. 404.

On an administration bond assigned by order of the Judge of the Court of Probate, assigning breaches: Young v. *Hughes*, 28 L. J. Ex. 161; 4 H. & N. 76.

Suggestion of breaches upon an issue of non est factum in an action upon an administration bond: Archbishop of Canterbury v. *Robertson*, 1 C. & M. 690.

Suggestion of breaches upon an issue of non est factum in an action upon an indemnity bond: Warre v. *Calvert*, 7 A. & E. 143.

See forms of entry of suggestion of breaches, Chit. Forms, 9th ed. 518.

Counts on indemnity bonds, post, "Indemnity," p. 149.

On bonds of guarantee, post, "Guarantee," p. 137.

On bonds conditioned not to exercise a trade, post, "Trade."

(a) Annuity bonds are within 8 & 9 Will. III. c. 11. (*Walcot* v. *Goulding*, 8 T. R. 126.)

On bail bonds, ante "Bail," p. 69.
On replevin bonds, post, "Replevin.

Broker.

Indebitatus Count by a Broker for Commission, etc. (a).

Money payable by the defendant to the plaintiff for work done by the plaintiff as a broker, and otherwise, for the defendant, and at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof, and for stock, shares, scrip, and goods sold and delivered by the plaintiff to the defendant.

Like counts: Knight v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566; *Smith* v. *Lindo*, 27 L. J. C. P. 196; 4 C. B. N. S. 395.

By a broker against his employer on his indemnity against payments made by the broker under the rules of the Stock Exchange: Smith v. *Lindo, supra (b).*

By a broker against his employer on the implied promise that shares delivered to him to sell were genuine; the shares being in fact forged, and the plaintiff having been compelled to replace them by genuine ones: Westropp v. *Solomon*, 8 C. B. 345.

Against a Sharebroker for not purchasing Shares according to order.

That in consideration that the plaintiff employed the defendant, as and being a stock and sharebroker, to purchase for the plaintiff —— shares in the [—— company] at the then market price of such shares for commission to the defendant, the defendant promised the plaintiff to purchase for the plaintiff the said shares at the price and on the terms aforesaid; and although the defendant could then have purchased for the plaintiff such shares at the then market price thereof, and a reasonable time for so doing elapsed, yet the defendant did not purchase the said shares for the plaintiff.

A like count: Williams v. *London Commercial Exchange Company*, 10 Ex. 569.

Against a broker employed to purchase goods, for not giving to his principal a true account of his purchases: Thom v. *Bigland*, 8 Ex. 724.

(*a*) An unlicensed broker cannot recover any commission for work as a broker, 6 Anne, c. 16. (*Smith* v. *Lindo*, 27 L. J. C. P. 196; 335; 4 C. B. N. S. 395; as to what constitutes a broker within the statute, see *ib.*)

(*b*) A person employed as a broker, though not licensed, is employed upon the terms of the usage of the market, as, upon the Stock Exchange, that the broker shall be treated as the principal and held liable for the price, which he may recover from his principal as money paid to his use. (*Smith* v. *Lindo*, 4 C. B. N. S. 395; 5 C. B. N. S. 587.) The usage of Lloyd's is not such an usage as binds a principal who employs an insurance broker to do business there without notice of it. (*Sweeting* v. *Pearce*, 29 L. J. C. P. 265; 30 L. J. C. P. 109; 7 C. B. N. S. 449.)

Against a broker employed to purchase and accept goods, for accepting goods not agreeing with the contract description: Zwilchenbart v. *Alexander*, 29 L. J. Q. B. 236.

Against a broker employed to sell goods, for delivering goods sold for ready money without receiving the price; Boorman v. *Brown*, 3 Q. B. 511.

Against an insurance broker, for not effecting an insurance on a ship pursuant to his retainer: Chapman v. *Walton*, 10 Bing. 57; *Turpin* v. *Bilton*, 5 M. & G. 455; *Cahill* v. *Dawson*, 26 L. J. C. P. 253; 3 C. B. N. S. 106.

Against same, for not giving notice to the shipowner of his omission to effect such insurance: Callander v. *Oelrichs*, 5 Bing. N. C. 58.

Against same, for negligence in collecting the losses from the underwriters: Bousfield v. *Creswell*, 2 Camp. 545.

CALLS. *See post*, "*Company*," p. 118.

CARRIERS (*a*).

(*a*) *Carriers.*]—By the common law certain duties are imposed upon a common carrier towards any person employing him. These *duties* arise upon the mere fact of the employment, without any express agreement, that is, by the delivery of goods to the carrier in the way of his business to be carried. The law also from the same fact of employment implies a *contract* identical in its terms with the duties so imposed by law. (See *Morgan* v. *Ravey*, 30 L. J. Ex. 131, 134; 6 H. & N. 265.) In whichever point of view the transaction is regarded, the duties and liabilities arising from the mere fact of employment may be varied or qualified by terms or stipulations introduced by express agreement. (See per Erle, J. *M'Manus* v. *Lancashire and Yorkshire Railway Co.*, 28 L. J. Ex. 353.)

Form of Count.]—The declaration against a carrier may accordingly be framed either upon the contract, charging the injury as a breach of contract; or upon the duty imposed by law, charging the injury as a breach of duty or wrong. And it may be framed in the latter form, even where terms have been superadded by express agreement to the duties arising out of the mere fact of employment. (*Boorman* v. *Brown*, 3 Q. B. 511; 11 Cl. & F. 1; *Ansell* v. *Waterhouse*, 6 M. & S. 385; *Courtenay* v. *Earle*, 10 C. B. 73.) The difference between the two modes of framing the declaration may be seen at once by a comparison of the above precedents with those framed in the form of tort. (See post, "*Carriers*," ch. 3.) The precedents given in both places may be readily adapted to either form.

A statement in the declaration charging the defendant as a common carrier upon the delivery of the goods to him in that capacity, imports that he is liable to the duties imposed by the common law as incident to the position of a common carrier. If it should appear upon the evidence that any express agreement, as is very frequently the case, was made between the parties varying or qualifying these duties, though in a point not material to the exact duty alleged to be broken, the plaintiff would fail in maintaining the above statement; and upon a plea traversing the delivery of the goods on the terms alleged, the defendant would be entitled to a verdict, unless an

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amendment were allowed. (*White* v. *Great Western Railway Co.*, 2 C. B. N. S. 7; 26 L. J. C. P. 158.)

It is therefore generally advisable in the declaration to avoid charging the defendant as a *common* carrier, and to describe him as a *carrier* merely: alleging (in tort) that he received the goods to be carried and dealt with in that particular manner, the breach of which is complained of; or (in contract) that he promised to the like effect. An allegation of *duty* in the declaration is superfluous, as it is a mere inference of law from the facts if stated, and is of no effect if the facts stated do not support it. (*Benett* v. *Peninsular and Oriental Steamboat Co.*, 6 C. B. 785; and see per Maule, J. *Brown* v. *Mallett*, 5 C. B. 599; *Dutton* v. *Powles*, 30 L. J. Q. B. 169.) The terms of the undertaking or promise must be stated correctly with all the exceptions and qualifications of liability to which it may be subject; as a promise to carry safely (fire and robbery excepted), (*Latham* v. *Rutley*, 2 B. & C. 20); an undertaking to carry safely with an exception of liability for loss of market. (*White* v. *Great Western Railway Co.* 2 C. B. N. S. 7; 26 L. J. C. P. 158.)

The above observations will be found to apply not only to the case of actions against carriers, but to all cases where, from the character of the defendant and the relations created between the parties by a retainer or employment, the law imposes a duty upon the defendant towards the plaintiff, and consequently implies a promise analogous to it.

It is proper to remark that if a question of the plaintiff's right to costs under the County Court Acts arises with reference to the action being one of contract or of tort, the determination of it will not be affected by the mere form of the declaration. The test is whether the cause of action is, in substance, founded on contract or on a wrong independent of contract. An action against a common carrier for not safely carrying is an action for the breach of the common law duty independently of contract, (*Pozzi* v. *Shipton*, 8 A. & E. 963; *Marshall* v. *York, Newcastle, and Berwick Railway Co.*, 11 C. B. 655); and consequently is not an action "of contract" within the 19 & 20 Vict. c. 108, s. 30. (*Tattan* v. *Great Western Railway Co.*, 29 L. J. Q. B. 184.) But if a bailee is charged upon a breach of a duty which has been imposed by express agreement between the parties, the action is held to be founded on contract, although the declaration is framed in tort. (*Legge* v. *Tucker*, 26 L. J. Ex. 71; 1 H. & N. 500; *Ansell* v. *Waterhouse*, 6 M. & S. 385.) Where no contract, properly so called, is made at all or could be implied, as where a carrier wholly refuses to receive goods, the declaration can only be framed in tort, and it is conceived that the action must for all purposes be treated as founded on a wrong.

Parties to the Action.]—An action against a carrier for the loss of goods or for any breach of duty or of contract, whether express or implied, is, as a general rule, to be brought in the name of the person who, by himself or his agent, employed the defendant, or delivered the goods to him. He may be either the absolute or special owner of the goods. (*Freeman* v. *Birch*, 3 Q. B. 492.)

In some instances, particularly in cases of the sale of goods which are forwarded by the vendor to the purchaser through a carrier, it becomes a matter of considerable nicety to determine whether the action should be brought in the name of the consignor or in that of the consignee. The action is to be brought in the name of the consignor where there is an express agreement between him and the carrier as to the employment on his account (*Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659; *Sargent* v. *Morris*, 3 B. & A. 277; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 60); and where the consignor, by necessary implication, employs the carrier on his own account, which is usually the case where the property in the goods has not passed to the consignee, and where they remain during the carriage at the risk of the consignor, as where goods are forwarded for sale on approval (*Swain* v. *Shepherd*, 1 M. & Rob. 223); and where the contract of sale is

Carriers; I. Carriers of Goods by Land (*a*).

Indebitatus Count by a Carrier for the Carriage of Goods.

Money payable by the defendant to the plaintiff for the conveyance of goods by the plaintiff for the defendant, at his request.

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within the Statute of Frauds and there is not sufficient evidence to charge the consignee. (*Coats* v. *Chaplin*, 3 Q. B. 483; *Morgan* v. *Sykes*, referred to in 3 Q. B. 486. Delivery to, and acceptance by, the carrier appointed by the purchaser to carry, is not a sufficient acceptance to charge the purchaser under the statute. *Norman* v. *Phillips*, 14 M. & W. 277; *Meredith* v. *Meigh*, 2 E. & B. 364.) And in such case the consignee cannot sue. (*Coombes* v. *Bristol and Exeter Railway Co.*, 27 L. J. Ex. 401; 3 H. & N. 510.)

But generally speaking, the action must be brought in the name of the consignee, for, except in such cases as those just referred to, the delivery to the carrier is a delivery to the consignee; it is for him that the goods are carried, and the consignor, in employing the carrier, is considered as the agent of the consignee for that purpose: as where goods are delivered to the carrier under a contract of sale by order of the consignee (*Dawes* v. *Peck*, 8 T. R. 330; and see *Dutton* v. *Solomonson*, 3 B. & P. 582; per Parke, B. *Wait* v. *Baker*, 2 Ex. 1, 7.); and where goods are shipped under a bill of lading by order and on account of the consignee. (*Brown* v. *Hodgson*, 2 Camp. 36.) In such cases it is immaterial that the consignor paid the carriage. (*King* v. *Meredith*, 2 Camp. 639.)

In an action for the loss of a passenger's luggage it was held that the owner might sue in his own name, though he travelled as the servant of another person who paid the fare for him and took his ticket. (*Marshall* v. *York, Newcastle, and Berwick Railway Co.*, 11 C. B. 655.) Where a box containing property of two persons was addressed to one only and sent on behalf of both, it was held they might join in suing for the loss of the goods. (*Metcalfe* v. *London and Brighton Railway Co.*, 4 C. B. N. S. 317.)

In actions of detinue or trover for the goods, the owner of the goods must sue: and in case of doubt as to the proper plaintiff, a difficulty may be avoided by joining a count in trover or detinue with counts against the carrier for breach of contract or duty; or, perhaps, advantage may be taken of the C. L. P. Act, 1860, s. 19, by suing in the names both of consignor and consignee.

As to the parties to be made defendants where several carriers are concerned, see the next note.

As to the rights and liabilities of the consignee of goods named in a bill of lading, and of the indorsee of a bill of lading, see *post*, 109, and see 1 Smith, L. C. 5th ed. 681.

(*a*) *Carriers of goods by land.*—The duties of a common carrier of goods imposed by law in the absence of special agreement are:—To receive for carriage all goods offered, provided he has convenience to carry them, and the goods are of a proper kind, and the employer is ready and willing to pay the proper and reasonable hire (*Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372; *Johnson* v. *Midland Ry. Co.*, 4 Ex. 367); to carry and deliver them within a reasonable time, and to insure their safety during the carriage and until delivery, the acts of God and the Queen's enemies only excepted. (*Forward* v. *Pittard*, 1 T. R. 27; *Pozzi* v. *Shipton*, 8 A. & E. 963; *Bourne* v. *Gatliffe*, 3 M. & G. 643; *Richards* v. *London, Brighton, and South Coast Ry. Co.*, 7 C. B. 839.)

Railway companies as common carriers are subject to the above duties (*Palmer* v. *Grand Junction Ry. Co.*, 4 M. & W. 749); and the additional duty is in general imposed upon them by their acts of carrying for all per-

Against a Carrier for not Carrying and Delivering Goods within a reasonable time.

That in consideration that the plaintiff would deliver to the defendant, as and being a carrier of goods for hire, certain goods to be by the defendant carried from —— to ——, and there delivered for the plaintiff, for reward to the defendant, the defendant promised the plaintiff to carry the said goods from —— to —— aforesaid, and there deliver the same for the plaintiff within a reasonable time in that behalf; and the plaintiff delivered the said goods to the defendant, and the defendant received the same, for the purpose and on the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods carried and delivered as aforesaid: yet the defendant did not carry and deliver the said goods for the plaintiff as aforesaid within a reasonable time in that behalf; whereby the plaintiff was deprived of the use of the said goods for a long time, and the same were diminished in value.

Like counts: Beal v. *South Devon Ry. Co.*, 5 H. & N. 875; *post*, ch. 3, "*Carriers.*"

A like count, stating special damage: Hadley v. *Baxendale*, 9 Ex. 341.

A like count against a common carrier subject to the terms of a special notice: Butt v. *Great Western Ry. Co.*, 11 C. B. 140.

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sons upon equal terms; though the only restriction upon the charge of a carrier at common law is that it must be reasonable. (*Parker* v. *Great Western Ry. Co.*, 7 M. & G. 253; *Baxendale* v. *Eastern Counties Ry. Co.*, 4 C. B. N. S. 63; *Piddington* v. *South-Eastern Ry. Co.*, 5 C. B. N. S. 111.) The power of railway companies to vary their liabilities by special contracts is limited to such conditions as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable. (17 & 18 Vict. c. 32, s. 7; *M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 28 L. J. Ex. 353; 4 H. & N. 327.) As to what conditions have been held just and reasonable, see *post*, ch. 5, *Carriers.*

The liability of a common carrier extends throughout the whole distance over which he professes to carry. Thus the liability of a railway company professing to carry over the lines of other companies, extends over the whole distance. (*Muschamp* v. *Lancashire and Preston Ry. Co.*, 8 M. & W. 421; *Wilby* v. *West Cornwall Ry. Co.*, 27 L. J. Ex. 181; 2 H. & N. 703; *Mytton* v. *Midland Ry. Co.*, 28 L. J. Ex. 385.) And a common carrier within the realm professing to carry to a place without the realm is liable to the duties of a common carrier for the whole distance. (*Crouch* v. *London and North-Western Ry. Co.*, 14 C. B. 255.) Where goods are accepted by a railway company to be carried to a place beyond their line subject to special conditions restricting their liability, the conditions apply throughout the whole distance. (*Collins* v. *Bristol and Exeter Ry. Co.*, 25 L. J. Ex. 185, reversed in Exchequer Chamber, 26 L. J. Ex. 103, but affirmed in the House of Lords, 29 L. J. Ex. 41.) Where a contract is made with one company to carry over the lines of other companies, the latter are no parties to it, and cannot be sued upon it (*Coxon* v. *Great Western Ry. Co.*, 29 L. J. Ex. 165; 5 H. & N. 274); unless, as has been suggested, the circumstances are such as to constitute the several companies partners in the transaction. (*Id.*; 5 H. & N. 274, 279.)

The damages in an action against a carrier for delay or loss in the carriage of goods are regulated by the rule laid down in the case of *Hadley* v. *Baxendale*, 9 Ex. 341, that such damages are recoverable, as may fairly and rea-

Against a Carrier for not Delivering according to the directions of the Plaintiff.

That in consideration that the plaintiff would deliver to the defendant, as and being a carrier of goods for hire, certain goods to be by the defendant carried from —— to ——, and there delivered according to the direction of the plaintiff, for reward to the defendant, the defendant promised the plaintiff to carry the said goods from —— to —— aforesaid, and there deliver the same according to the direction of the plaintiff in that behalf; and the plaintiff delivered the said goods to the defendant, and the defendant received the same for the purpose and on the terms aforesaid, and the plaintiff directed the defendant to deliver the said goods at a certain place in —— aforesaid, called ——, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods delivered by the defendant at the last-mentioned place; yet the defendant did not deliver the said goods at the last-mentioned place, whereby the plaintiff lost the said goods.

A like count: Scotthorn v. *South Staffordshire Ry. Co.*, 8 Ex. 341.

Against a Carrier for not Carrying and Delivering Goods in time for a Market.

That in consideration that the plaintiff would deliver to the defendant, as and being a carrier of goods for hire, certain goods to be by the defendant carried from —— to ——, and there delivered to the plaintiff in time for a market to be there held at noon on the —— day of ——, A.D. ——, for reward to the defendant, the defendant promised the plaintiff to carry the said goods from —— to —— aforesaid, and there deliver the same to the plaintiff in time for the said market to be so held as aforesaid; and the plaintiff delivered the said goods to the defendant, and the defendant received the same for the purpose and on the terms aforesaid, and all conditions were performed, and all things happened, and all times

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sonably be considered as arising naturally, *i. e.* according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. According to this rule the plaintiff, a miller, in an action against a carrier for delay in delivering a shaft of his mill, was held not entitled to recover as damages the loss of profits by the stoppage of the mill. (*Ib.*) So the owner of a cotton-mill in an action against a carrier for delay in delivering cotton to be used in his mill, was held not entitled to recover damages for the wages paid to workmen and the loss of profits while the mill was stopped from want of the cotton. (*Gee* v. *Lancashire and Yorkshire Ry. Co.*, 6 H. & N. 211; 30 L. J. Ex. 11.) Deterioration in quality or in the market-value of goods consequent upon delay in the delivery of them by a carrier may be charged as damages. (*Wilson* v. *Lancashire Ry. Co.*, 30 L. J. C. P. 293; 9 C. B. N. S. 632; and see *Beal* v. *South Devon Ry. Co.*, 29 L. J. Ex. 441; 5 H. & N. 875.) And loss occasioned by a fall in the market although the carrier had no notice that the goods were sent for sale. (*Collard* v. *South-Eastern Ry. Co.*, 30 L. J. Ex. 393.) In an action against a carrier for the loss of goods, the plaintiff is entitled to recover the value of the goods at the place to which and not at the place from which they are consigned. (*Rice* v. *Baxendale*, 30 L. J. Ex. 371.)

elapsed necessary to entitle the plaintiff to have the said goods carried from —— to —— aforesaid, and there delivered to him by the defendant at the time aforesaid; yet the defendant did not deliver the said goods to the plaintiff at —— aforesaid, in time for the said market there held as aforesaid; whereby the plaintiff was deprived of the use of the said goods, and lost the profits which he would have made by selling them at the said market, and the benefit of the expense which he incurred in travelling to —— aforesaid to meet the said goods, and in preparing to receive the same and to sell them at the said market, and the said goods were deteriorated and diminished in value.

Against a carrier on a special contract to forward perishable goods the same evening: Pickford v. *Grand Junction Ry. Co.*, 12 M. & W. 766.

Against a Carrier for the Loss of Goods.

That in consideration that the plaintiff would deliver to the defendant, as and being a carrier of goods for hire, certain goods of the plaintiff to be by the defendant safely carried from —— to ——, and there delivered for the plaintiff, for reward to the defendant in that behalf, the defendant promised the plaintiff that he would safely carry the said goods from —— to —— aforesaid, and there deliver the same for the plaintiff as aforesaid; and the plaintiff delivered the said goods to the defendant, and the defendant received the same for the purpose and on the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods safely carried from —— to —— aforesaid, and there delivered for him as aforesaid; yet the defendant did not safely carry the said goods from —— to —— aforesaid, and there deliver the same for the plaintiff as aforesaid; whereby the said goods were wholly lost to the plaintiff.

A like count; Syms v. *Chaplin*, 5 A. & E. 634; *and see post*, c. 3, "*Carriers.*"

Count against a carrier for injury to goods, alleging a declaration of value and an engagement to pay an increased rate of charge under the Carriers' Act, 11 *Geo. IV. & Will. IV. c.* 68: *Behrens* v. *Great Northern Ry. Co.*, 30 L. J. Ex. 153; 6 H. & N. 366 (*a*).

Action against a railway company for money received to recover back an excessive rate of charge for packed parcels: Piddington v. *South-Eastern Ry. Co.*, 27 L. J. C. P. 295; 5 C. B. N. S. 111; *Garton* v. *Bristol and Exeter Ry. Co.*, 28 L. J. Ex. 169; 4 H. & N. 33; *Baxendale* v. *Eastern Counties Ry. Co.*, 27 L. J. C. P. 137; 4 C. B. N. S. 63 (*b*).

(*a*) See the Carriers' Act, *post*, c. 5, "Carriers." Where a person delivers to a carrier goods of the description mentioned in the Act, and declares their nature and value, it lies upon the carrier to demand the increased charge, and if no such demand is made, the carrier is liable for loss or injury to the goods although the increased charge has not been tendered or paid. (*Behrens* v. *Great Northern Ry. Co.*, 30 L. J. Ex. 153; 6 H. & N. 366.)

(*b*) Excessive charges paid for the carriage of packed parcels may be re-

Against a Railway Company for not providing Trucks to convey Carriages.

That the defendants were possessed of a railway from —— to ——, and of certain trucks provided by them for the conveyance of carriages upon the said railway for hire; and thereupon, in consideration that the plaintiff would deliver to the defendants certain carriages of the plaintiff, to be conveyed upon the said railway of the defendants, from —— to —— aforesaid, for reward to the defendants, the defendants promised the plaintiff to provide trucks for the conveyance of the said carriages, and to convey the said carriages thereon from —— to —— aforesaid; and the plaintiff delivered the said carriages to the defendants and they received the same for the purpose and on the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have trucks provided and the said carriages conveyed as aforesaid; yet the defendants did not provide trucks for the conveyance of the said carriages, nor did they convey the said carriages from —— to —— aforesaid, whereby the plaintiff was deprived of the use of the said carriages for a long time, and lost the benefit of the expense which he incurred in delivering the said carriages to the defendants, and was put to expense in conveying the said carriages to —— aforesaid.

Against a railway company on a contract to provide trucks for the carriage of horses, for not providing proper trucks: M'Manus v. *Lincolnshire and Yorkshire Ry. Co.*, 27 L. J. Ex. 201; 2 H. & N. 693; 28 L. J. Ex. 353.

Against a Carrier for Damage done to Furniture in removing it.

That in consideration that the plaintiff would employ the defendant to remove and carry from one place to another certain furniture of the plaintiff for reward to the defendant, the defendant promised the plaintiff to use due care, skill, and diligence in removing and carrying the said furniture as aforesaid, and the plaintiff employed the defendant for the purpose and on the terms aforesaid; yet the defendant did not use due care, skill, and diligence in removing and carrying the said furniture as aforesaid, and in so doing

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covered under the common count for money received, but charges paid in excess of those paid by other persons cannot be recovered as money received merely on the ground of the inequality of charge. (*Garton* v. *Bristol and Exeter Ry. Co.*, 30 L. J. Q. B. 273; E. B. & E. 112.)

A railway company cannot charge more for a packed parcel consigned to one person containing several parcels belonging to different persons, than for a parcel belonging all to one person. (*Crouch* v. *Great Western Ry. Co.* 11 Ex. 742; *Parker* v. *Great Western Ry. Co.*, 11 C. B. 545; *Piddington* v. *South-Eastern Ry. Co.*, 5 C. B. N. S. 111.) But where the several parcels belonging to different persons are not enclosed in one package, although they are all consigned at one time by and to the same person, the company is justified in charging an increased rate in respect of the increased trouble in weighing and entering the different parcels. (*Baxendale* v. *Eastern Counties Ry. Co.*, 4 C. B. N. S. 63; and see *Parker* v. *Great Western Ry. Co.*, 25 L. J. Q. B. 209, 6 E. & B. 77.)

broke and injured the same, whereby the said furniture was much damaged and lessened in value.

Against a Railway Company for not safely keeping Goods left in their custody at one of their Stations.

That in consideration that the plaintiff would deliver to the defendants certain goods of the plaintiff to be by the defendants safely and securely kept and redelivered to the plaintiff on request for reward to the defendants, the defendants promised the plaintiff safely and securely to keep the said goods and to redeliver the same to the plaintiff on request; and the plaintiff delivered to the defendants and the defendants received the said goods for the purpose and on the terms aforesaid, and the plaintiff afterwards, and within a reasonable time in that behalf, requested the defendants to redeliver the same to the plaintiff, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods safely and securely kept and redelivered by the defendants to the plaintiff as aforesaid; yet the defendants did not safely and securely keep the same, and redeliver the same to the plaintiff as aforesaid, whereby the said goods were lost to the plaintiff, and he was put to expense in endeavouring to recover possession of them.

Against a Railway Company for not Forwarding and Delivering in due time Goods left at one of their Stations to be safely kept and forwarded according to order.

That the defendants were carriers of goods for hire, and in consideration that the plaintiff delivered to the defendants at —— certain goods of the plaintiff, to be by them kept and returned to him or carried and delivered for him at his option as hereinafter mentioned, for reward to the defendants, the defendants promised the plaintiff that they would at his option safely and securely keep the said goods for him and return them to him on request, or carry and deliver them for him to and at such place as he should direct by any orders to be given by him to them; and the plaintiff afterwards, and whilst the defendants held the said goods for the purpose and on the terms aforesaid, directed the defendants by certain orders given by him to them to carry the said goods from —— aforesaid to ——, and to deliver the same there for the plaintiff; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods so carried by the defendants from —— aforesaid to —— aforesaid, and there delivered for the plaintiff according to the defendants' said promise in that behalf; yet the defendants did not within a reasonable time in that behalf carry the said goods from —— to —— aforesaid, and there deliver the same for the plaintiff; whereby the plaintiff was deprived of the use of the said goods for a long time, and the same were deteriorated in value.

Count against a booking-office keeper for losing goods: see post, c. 3, *"Carriers."*

Carriers; II. Carriers of Goods by Water (*a*).

Indebitatus Count by a Carrier for Freight (C. L. P. Act, 1852, Sch. B. 13 (b).)

Money payable by the defendant to the plaintiff for freight for the conveyance by the plaintiff for the defendant, at his request, of goods in ships [*after the word* freight *add* primage and average *if claimed*].

A like count with a count for demurrage: Sweeting v. *Darthez*, 14 C. B. 538.

A like count for freight payable in advance: Seeger v. *Duthie*, 29 L. J. C. P. 253.

Special counts for freight on charterparties, post "Charterparties," p. 116.

(*a*) *Carriers of goods by water.*]—Common carriers of goods by water, in the absence of any express contract, are subject to the same duties at common law as carriers of goods by land (see *ante*, 103), and no difference arises in their liabilities in consequence of the place of destination being beyond the seas and out of the realm. (See *Benett* v. *Peninsular and Oriental Steam Boat Co.*, 6 C. B. 775.) But it is usual for ship-owners to make special contracts respecting the carriage of goods by charterparty, bill of lading, or otherwise.

(*b*) An indebitatus count will not lie for freight under a charterparty by deed (*Atty* v. *Parish*, 1 B. & P. N. R. 105); where the master of a ship enters into a charterparty by deed, the ship-owner cannot sue in an indebitatus count for the freight carried under it. (*Schack* v. *Anthony*, 1 M. & S. 573.) In general, either the master or the owner may sue for freight where the contract is not under seal.

As to when an action lies for freight *pro ratâ itineris* on delivery of the goods at a place short of their destination, see *Cook* v. *Jennings*, 7 T. R. 381; *Hunter* v. *Prinsep*, 10 East, 394; *Vlierboom* v. *Chapman*, 13 M. & W. 230; and as to the claim for freight *pro ratâ* on delivery of an incomplete cargo, see *Ritchie* v. *Atkinson*, 10 East, 295.

The statute 18 & 19 Vict. c. 111, for amending the law relating to bills of lading, by s. 1 enacts that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

By s. 2 "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

Before this statute the indorsement of the bill of lading transferred only the property in the goods, and not the contract; and the assignee could neither sue nor be sued upon it. (*Lickbarrow* v. *Mason*, 2 T. R. 63; 6 East, 21; 1 Smith's L. C. 5th ed. 681; *Thompson* v. *Dominy*, 14 M. & W. 403; *Howard* v. *Shepherd*, 9 C. B. 297.) But if the assignee accepted the goods under the bill of lading, this might be evidence of a new contract to pay freight, or even demurrage, according to the terms of it. (*Möller* v. *Young*, 5 E. & B. 755; 25 L. J. Q. B. 94; *Stindt* v. *Roberts*, 5 D. & L. 460; *Smith* v. *Sieveking*, 4 E. & B., 945; 5 E. & B. 589; *Chappel* v. *Comfort*, 31 L. J.

Indebitatus Count by a Carrier for demurrage. (*C. L. P. Act*, 1852, *Sched. B.* 14 (*a*).)

Money payable by the defendant to the plaintiff for the demurrage of a ship of the plaintiff kept on demurrage by the defendant.

Indebitatus Count by a Carrier for Lighterage.

Money payable by the defendant to the plaintiff for the lighterage, conveyance, shipping, and landing of goods conveyed in lighters and other vessels, and shipped and landed from the same by the plaintiff for the defendant, at his request.

Indebitatus Count for Tonnage on Canals.

Money payable by the defendant to the plaintiff for the tonnage of goods conveyed by the plaintiff for the defendant, at his request, in barges and other vessels.

By the Carrier against the Shipper for Freight and Primage payable in advance.

That in consideration that the plaintiff would receive on board of his ship, called ——, then about to sail from —— to ——, certain goods of the defendant, to be conveyed by the plaintiff in the said ship from —— to —— aforesaid, the defendant promised the plaintiff that he would, two months after the said ship with the said goods on board thereof should have set sail on the said voyage, pay to the plaintiff freight in advance at the rate of £—— per ton measurement for each ton of the said goods, and also primage at the rate of £—— per cent. upon the said freight; and the plaintiff received the said goods of the defendant on board of the said ship for the purpose and on the terms aforesaid, and the said ship with the said goods on board thereof afterwards set sail on the said voyage, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said freight and primage, yet the defendant has not paid the same.

A like count: Tindall v. *Taylor*, 4 E. & B. 219; 24 L. J. Q. B. 12.

Indebitatus count for freight payable in advance: Seeger v. *Duthie*, 29 L. J. C. P. 253; 8 C. B. N. S. 45.

By the Owner of a Ship against the Shipper and Consignee of Goods for not receiving the Goods within a reasonable time.

That in consideration that the plaintiff received on board of his ship called ——, certain goods of the defendant, to be by the plain-

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C. P. 58.) And if the freight, etc., was payable "as per charterparty," he might become liable to the terms and conditions of that instrument. (*Sanders* v. *Vanzeller*, 4 Q. B. 260; *Wegener* v. *Smith*, 15 C. B. 285; see *Kern* v. *Deslandes*, 30 L. J. C. P. 297.)

(*a*) This count will lie only where there is an express agrement to pay demurrage *eo nomine*, or against the indorsee of a bill of lading containing an express stipulation by reference or otherwise to that effect. (See *supra*.) Where the consignee becomes otherwise chargeable for the detention of

tiff carried in the said ship from —— to ——, and there delivered to the defendant (certain perils and casualties only excepted), the defendant paying freight for the same as agreed upon, the defendant promised the plaintiff to receive the said goods at —— aforesaid from the plaintiff in a reasonable time after the defendant should have notice of the plaintiff being ready to deliver the same as aforesaid; and the said ship afterwards arrived with the said goods at —— aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods received by the defendant as aforesaid; yet the defendant did not nor would receive the said goods within such reasonable time as aforesaid; whereby the said ship was detained at —— aforesaid for a long time, and the plaintiff was deprived of the use of the said ship, and incurred expense in maintaining the crew thereof during all the time last aforesaid.

As to this count, see Jesson v. *Solly*, 4 Taunt. 52; *Evans* v. *Forster*, 1 B. & Ad. 118; *Möller* v. *Young*, 29 L. J. Q. B. 94; 5 E. & B. 755.

Count by a carrier upon a contract for the carriage of goods in a lighter, for not accepting the goods within a reasonable time: Granger v. *Dacre*, 12 M. & W. 431.

By the carrier against the shipper upon the implied warranty that the goods shipped were not dangerous: Brass v. *Maitland*, 26 L. J. Q. B. 49.

By the Consignee of Goods against the Master of a Ship on the Bill of Lading for not delivering (*a*).

That by a bill of lading, made on the —— day of ——, A.D. —— by the defendant, and delivered to the plaintiff, the defendant promised the plaintiff that certain goods of the plaintiff in the said bill of lading mentioned and then shipped on board the ship ——, in the port of ——, should be delivered at —— (certain perils and casualties only excepted), to the plaintiff, he paying freight for the same [with primage and average accustomed]; and the delivery of the said goods as aforesaid was not prevented by any of the perils or casualties aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods delivered to him at —— aforesaid; yet the said goods were not delivered to the plaintiff at —— aforesaid, whereby the same were wholly lost to the plaintiff. [*If the cause of action is for not delivering in good order, state, according to the bill of lading, that the goods were* "shipped in good order" *and* "to be delivered in like order and condition," *and charge the breach accordingly.*]

By the Indorsee of a Bill of Lading against the Master for not delivering the Goods. (18 *&* 19 *Vict. c.* 111, *s.* 1, *see ante, p.* 109.)

That by a bill of lading, made on the —— day of ——, A.D. ——

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the ship or delay in accepting the goods carried, he must be sued in a special count. (*Evans* v. *Forster*, 1 B. & Ad. 118; *Horn* v. *Bensusan*, 9 C. & P. 709; *Möller* v. *Young*, 5 E. & B. 755; see "*Charterparty*," p. 116.)

(*a*) As to the proper party to sue the carrier, see *ante*, p. 109, n.

by the defendant, and delivered to *G. H.*, the defendant promised the said *G. H.* that certain goods of the said *G. H.* in the said bill of lading mentioned, and then shipped on board the ship ——, in the port of ——, should be delivered at —— (certain perils and casualties only excepted), to the said *G. H.* or his assigns, he or they paying freight for the same [with primage and average accustomed], and the said *G. H.* indorsed the said bill of lading to the plaintiff, to whom the property in the said goods thereby passed; and the delivery of the said goods as aforesaid was not prevented by any of the perils or casualties aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods delivered to him at —— aforesaid; yet the said goods were not delivered to the plaintiff at —— aforesaid, whereby the same were wholly lost to the plaintiff. [*See the directions at the end of the preceding form.*]

A like count by the indorsee of a bill of lading against the shipowner: Shand v. *Sanderson*, 28 L. J. Ex. 278; 4 H. & N. 381.

Counts by the indorsee of a bill of lading against the shipowner [*held bad before the statute*]: *Thompson* v. *Dominy*, 14 M. & W. 403; *Howard* v. *Shepherd*, 9 C. B. 297.

Count against the indorsee of a bill of lading: Chappel v. *Comfort*, 31 L. J. C. P. 58.

Against a Carrier for negligently stowing the Goods, whereby they were damaged.

That in consideration that the plaintiff would deliver to the defendant certain goods of the plaintiff to be carried in a ship of the defendant from —— to ——, for reward to the defendant, the defendant promised the plaintiff to use due and proper care and skill in stowing the said goods on board of the said ship, and to carry the said goods from —— to —— as aforesaid (certain perils and casualties only excepted); and the plaintiff delivered the said goods to the defendant and the defendant received and had the same for the purpose and on the terms aforesaid, and the defendant was not prevented from performing his said promise by any of the perils and casualties aforesaid; yet he did not use due and proper care and skill in stowing the said goods on board of the said ship; whereby the said goods were damaged and deteriorated in value.

Like counts: Anderson v. *Chapman*, 5 M. & W. 483; *and see other counts in tort, post*, c. 3, "*Carriers.*"

Count for damage done to the goods by stowing them on deck: Sargent v. *Morris*, 3 B. & Ald. 277.

For negligence in loading goods on board under a special contract: Cooke v. *Wilson*, 26 L. J. C. P. 15; 1 C. B. N. S. 153.

Counts for losing goods: Gatliffe v. *Bourne*, 4 Bing. N. C. 314.

A like count with a second count upon a contract to carry goods safely from the wharf of landing to the plaintiff's place of business: James v. *Bourne*, 4 Bing. N. C. 420.

Count for damaging the goods: Bennion v. *Davison*, 3 M. & W. 179; *Alston* v. *Herring*, 25 L. J. Ex. 177; 11 Ex. 822.

And see counts framed in tort, post, ch. 3, "*Carriers.*"

Count against a carrier by water on the implied promise that his vessel was seaworthy: Lyon v. *Mells*, 5 East, 428; *and see as to this cause of action, Shaw* v. *York and North Midland Ry. Co.*, 13 Q. B. 347; *M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 27 L. J. Ex. 201.

Against the Master of a Steam-Tug for negligence in towing the Plaintiff's Ship.

That in consideration that the plaintiff would employ the defendant with a stem-tug of the defendant to tow a certain ship of the plaintiff from the port of —— out to sea, for reward to the defendant, the defendant promised the plaintiff so to tow the said ship in a careful, skilful, and proper manner; and the plaintiff employed the defendant, and the defendant accepted and entered upon the said employment, for the purpose and upon the terms aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said ship so towed by the defendant in a careful, skilful, and proper manner; yet the defendant towed the said ship in a negligent, unskilful, and improper manner, whereby the said ship became and was stranded and damaged.

A like count: Symonds v. *Pain*, 30 L. J. Ex. 256; 6 H. & N. 709.

Carriers; III. Carriers of Passengers (*a*).

Indebitatus Count by a Carrier for Passage Money.

Money payable by the defendant to the plaintiff for the convey-

(*a*) *Carriers of Passengers.*—The duty of a carrier of passengers is to carry all passengers who offer themselves in a fit and proper state to be carried, provided the carrier has convenience to carry them, and the passengers are ready and willing to pay the proper and reasonable fare. But carriers of passengers do not insure the safety of passengers during the carriage, and are only responsible for injuries caused by negligence. (See *Birkett* v. *Whitehaven Junction Ry. Co.*, 4 H. & N. 730, 734.) The action for a breach of duty in carrying a passenger or his luggage, is so far independent of contract that the passenger may maintain the action in his own name, though another person took and paid for the ticket for him. (*Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655.) A passenger taking a ticket from one company for a journey extending over the lines of other companies, contracts with that company only which issued the ticket and cannot sue the others upon the contract. (*Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615; 28 L. J. Ex. 385; and see *ante*, p. 104.) As to the liability of a railway company carrying passengers over the lines of another company for injuries caused by the negligence of the latter company, see *Birkett* v. *Whitehaven Junction Ry. Co.*, 4 H. & N. 730. A passenger can claim for luggage only in respect of personal luggage, and not for merchandize carried by him as luggage. (*Cahill* v. *London and North-Western Ry. Co.*, 30 L. J. C. P. 289; 10 C. B. N. S. 154; and see *Munster* v. *South-Eastern Ry. Co.*, 4 C. B. N. S. 676.)

The damages recoverable in an action against a carrier for delay in carrying a passenger are the expenses actually incurred by the delay, such as lodging and conveyance, but not loss occasioned by not reaching the

ance of the defendant in a carriage [*or* a ship], at his request, by the plaintiff.

Against a Carrier for not carrying a Passenger who has booked his Place.

That the defendant was a carrier of passengers and their luggage, in a carriage, from —— to ——, for hire; and thereupon in consideration that the plaintiff would take and engage a place in the carriage of the defendant, to be carried therein as a passenger with his luggage, from —— to —— aforesaid, for hire to the defendant, the defendant promised the plaintiff to carry the plaintiff with his said luggage in the said carriage, from —— to —— aforesaid; and the plaintiff took and engaged a place in the said carriage, to be carried therein with his luggage as aforesaid, on the terms aforesaid, and all conditions were fulfilled, and all things happened and all times elapsed, necessary to entitle the plaintiff to be carried with his said luggage in the said carriage from —— to —— aforesaid; yet the defendant did not nor would carry the plaintiff with his said luggage in the said carriage, from —— to —— aforesaid; whereby the plaintiff was obliged to procure another conveyance, and was put to expense and inconvenience.

Count by Husband for Loss of his Wife's Luggage.

That the defendants were carriers of passengers and their luggage [on a railway] from —— to ——, and in consideration that the plaintiff caused his wife to become and be a passenger to be carried with her luggage by the defendants [on the said railway] from —— to —— aforesaid within a reasonable time in that behalf, for reward then paid by the plaintiff to the defendants in that behalf, the defendants promised the plaintiff to carry his said wife with her said luggage [on the said railway] safely and securely from —— to —— aforesaid, and there to deliver to her the said luggage for the plaintiff within a reasonable time in that behalf as aforesaid; and although such reasonable time elapsed, yet the defendants did not safely and securely carry the said luggage from —— to —— aforesaid, and there deliver the same to the plaintiff's wife for the plaintiff within such reasonable time as aforesaid, nor until a long time after had elapsed; and during all that time the plaintiff was deprived of the said luggage, and was put to much trouble and expense, and lost much time in endeavouring to obtain the same, and in providing other goods in the place of the said luggage.

Against a railway company, for the loss of a passenger's luggage: Elwell v. *Grand Junction Railway Co.*, 5 M. & W. 669; *Cahill* v. *London and North Western Railway Co.*, 30 L. J. C. P. 289; *and see counts on the same cause of action framed in tort, post*, ch. 3, "*Carriers.*"

Against a cab proprietor, for the loss of a passenger's luggage from

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place in the time of the contract, as loss of business by not keeping appointments. (*Hamlin* v. *Great Northern Ry. Co.*, 26 L. J. Ex. 20; 1 H. & N. 408.)

a hired cab: Ross v. *Hill*, 2 C. B. 877; *Powles* v. *Hider*, 6 E. & B. 207; 25 L. J. Q. B. 331.

Against a Railway Company for Delay in a Train.

That the defendants were carriers of passengers in carriages on a railway from —— to —— for reward to the defendants; and thereupon on the —— day of —— A.D. —— in consideration that the plaintiff at the request of the defendants would pay them a sum of money as and for the price of their carrying the plaintiff as a passenger in one of the said carriages from —— to —— aforesaid, by a train which the defendants advertised in their published train-bill, and represented to the plaintiff, to be a train that would start from —— to —— aforesaid at —— o'clock in the [afternoon], and arrive at —— aforesaid at —— o'clock in the [afternoon] of the said day, the defendants promised the plaintiff that they would use reasonable care and diligence that the said train should start and arrive at the respective times aforesaid; and the plaintiff accordingly paid the defendants the said sum of money for the purpose and on the terms aforesaid, and became such passenger to be so carried by the defendants as aforesaid by the said train; yet the defendants did not use reasonable care and diligence that the said train should start and arrive at the respective times aforesaid, and for want of such care and diligence the said train started from —— aforesaid and arrived at —— aforesaid respectively at much later times than the respective times aforesaid; whereby the plaintiff was delayed and put to expense and inconvenience and was prevented from attending to his business at —— aforesaid as he otherwise would have done.

A like count: Hamlin v. *Great Northern Railway Co.*, 26 L. J. Ex. 20; 1 H. & N. 408.

Against a railway company, for not running a train as advertised by the time tables: Denton v. *Great Northern Railway Co.*, 5 E. & B. 860.

See other counts against carriers of passengers framed in tort, post, c. 2, "Carriers."

Carriers; IV. Of Messages.

Against an Electric Telegraph Company for not Transmitting a Message correctly.

That the defendants carried on the business of transmitting messages by telegraph for reward to the defendants; and thereupon in consideration that the plaintiff would pay to the defendants —— shillings, the defendants promised the plaintiff that they would transmit correctly for the plaintiff from —— to [the master of a ship then lying at ——] the message following, that is to say:—["Proceed to Hull direct"]; and the plaintiff paid to the defendants the said —— shillings, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said message correctly transmitted by the defendants as afore-

said; yet the defendants did not correctly transmit to the master of the said ship the said message as aforesaid, and transmitted to him another and different message in the terms following:—["Proceed to Southampton direct"]; whereby [the said master of the said ship proceeded directly with the said ship to Southampton instead of to Hull, as he would otherwise have done, and the plaintiff lost the benefit of the said ship proceeding to Hull in pursuance of the said message, and incurred great expense by reason of the said ship so proceeding to Southampton as aforesaid.]

A like count: Mac Andrew v. *Electric Telegraph Co.*, 17 C. B. 3.

Charterparties.

Indebitatus counts for freight and demurrage, ante, "Carriers by Water," pp. 109, 110.

By Shipowner against Charterer, for not paying Freight by Bills as agreed upon.

That the plaintiff and the defendant agreed by charterparty, that the plaintiff's ship, called ——, should with all convenient speed sail to ——, and that the defendant should there load her with a full cargo of —— or other lawful merchandise, which she should carry to ——, and there deliver on payment by the defendant to the plaintiff of freight at £—— per ton, one-half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by approved bills [on London] at —— month's date, or in cash less discount at £5 per cent. per annum, at the defendant's option; and afterwards the said ship sailed to —— aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in the said ship to —— aforesaid, and there delivered the same to the defendant, and the said freight amounted in the whole to the sum of £——, and the defendant paid to the plaintiff one-half of the said freight in cash, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the remainder of the said freight as aforesaid; yet the defendant did not pay to the plaintiff the remainder of the said freight, either by such approved bills as aforesaid or in cash less discount as aforesaid.

A like count: Isberg v. *Bowden*, 8 Ex. 852.

Special counts for non-payment of freight according to the terms of the charterparty: Sweeting v. *Darthez*, 14 C. B. 538; *Gether* v. *Capper*, 15 C. B. 39; 696; *Santos* v. *Brice*, 6 H. & N. 290.

Count for freight payable in advance, ante, "Carriers by Water," p. 110; *Tindall* v. *Taylor*, 4 E. & B. 219; *Thompson* v. *Gillespy*, 5 E. & B. 209; *Seeger* v. *Duthie*, 29 L. J. C. P. 253; 8 C. B. N. S. 45.

By Owner for Demurrage and for Detention beyond the days of Demurrage.

That the plaintiff and the defendant agreed by charterparty that

the plaintiff's ship, called ——, should with all convenient speed sail to ——, and that the defendant should there load her with a full cargo of ——, or other lawful merchandise, which she should carry to ——, and there deliver on payment of freight, £—— per ton, and that the defendant should be allowed ten days for loading and ten days for discharge, and ten days for demurrage, if required, at £—— per day; and afterwards the said ship sailed to —— aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in the said ship to —— aforesaid, and there delivered the same to the defendant, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said charterparty performed by the defendant on his part; and the defendant kept the said ship on demurrage ten days over and above the said periods so agreed upon for loading and discharge as aforesaid, and thereby became liable to pay to the plaintiff £—— for demurrage as aforesaid, but has not paid the same; and the defendant also detained the said ship —— days beyond the periods so agreed upon for loading and discharge and demurrage as aforesaid; whereby the plaintiff during all that time was deprived of the use of the said ship, and incurred expense in keeping the same and maintaining the crew thereof.

Like counts: Brown v. *Johnson*, 10 M. & W. 331; *Benson* v. *Blunt*, 1 Q. B. 870; *Jackson* v. *Galloway*, 1 C. B. 280; *Lennard* v. *Robinson*, 5 E. & B. 125; *Alexander* v. *Dowie*, 1 H. & N. 152.

For detention before loading: Esposito v. *Bowden*, 4 E. & B. 963; *Erichsen* v. *Barkworth*, 3 H. & N. 601; 27 L. J. Ex. 472.

By Shipowner against Charterer for not loading pursuant to the Charterparty. (C. L. P. Act, 1852, Sched. B. 22.)

That the plaintiff and the defendant agreed by charterparty that the plaintiff's ship, called the ——, should with all convenient speed sail to ——, or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow, or other lawful merchandise, which she should carry to ——, and there deliver, on payment of freight £—— per ton, and that the defendant should be allowed ten days for loading, and ten days for discharge, and ten days for demurrage, if required, at £—— per day; and the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at ——, and the time for so doing elapsed; yet the defendant made default in loading the agreed cargo.

Like counts: Clipsham v. *Vertue*, 5 Q. B. 265; *Taylor* v. *Clay*, 9 Q. B. 713; *Crookewit* v. *Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893; *Wilson* v. *Hicks*, 26 L. J. Ex. 242; *Smith* v. *M'Guire*, 27 L. J. Ex. 465; 3 H. & N. 554; *Bruce* v. *Nicolopulo*, 11 Ex. 129; *Turrabochia* v. *Hickie*, 26 L. J. Ex. 26; 1 H. & N. 183.

For not loading with "usual dispatch" according to charterparty, setting out the charterparty verbatim: Kearon v. *Pearson*, 31 L. J. Ex. 1.

For not loading on a homeward voyage: Freeman v. *Taylor*, 8 Bing. 124; *Irving* v. *Clegg*, 1 Bing. N. C. 54; *Cuthbert* v. *Cumming*, 10 Ex. 809; *Reid* v. *Hoskins*, 4 E. & B. 979.

For breach in refusing to load before the expiration of the lay

days: Barwick v. *Buba*, 26 L. J. C. P. 280; 2 C. B. N. S. 563; *Avery* v. *Bowden*, 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; 5 E. & B. 714.

For delay in loading, stating special damage in expenses of maintaining the crew and in paying dock dues: Hudson v. *Clementson*, 25 L. J. C. P. 234; 18 C. B. 213; *Adams* v. *Royal Mail Steam Packet Company*, 28 L. J. C. P., 33; 5 C. B. N. S. 492.

By Charterer against Shipowner for abandoning the voyage to the Port of Loading.

That the plaintiff and the defendant agreed by charterparty that the defendant's ship called ——, then at ——, should, with all convenient speed, having liberty to take an outward cargo for owner's benefit, sail to ——, or so near thereto as she could safely get, and there load from the factors of the plaintiff a full cargo of ——, which she should carry to ——, and there deliver on payment of freight (certain perils and casualties in the said charterparty mentioned only excepted); and the said ship was not prevented by any of the said perils or casualties from completing the said outward voyage (*a*), and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said charterparty performed by the defendant on his part; yet the said ship did not with all convenient speed sail to —— aforesaid, or so near thereto as she could safely get, and the defendant caused the said ship to deviate from her said voyage, and abandoned the said voyage.

Like counts: Schilizzi v. *Derry*, 4 E. & B., 873; *Pope* v. *Bavidge*, 10 Ex. 73.

For delay and deviation in the voyage to the port of loading: McAndrew v. *Adams*, 1 Bing. N. C. 29; *Porter* v. *Izat*, 1 M. & W. 381.

For refusing to proceed to port of ultimate destination according to orders: Pole v. *Cetcovich*, 9 C. B. N. S. 430.

On a charterparty for six voyages, for refusing to make more than three: Wheeler v. *Bavidge*, 9 Ex. 668.

Count for continuing the voyage after the ship had become unseaworthy, whereby the plaintiff's goods were lost: Worms v. *Storey*, 11 Ex. 427.

Charterer against shipowner for not carrying and delivering according to the charterparty: Vaughan v. *Glenn*, 5 M. & W. 577; *and see ante*, "*Carriers by Water*," p. 111.

By charterer against owner for not repaying freight paid in advance upon failure to deliver the cargo: Charles v. *Altin*, 15 C. B. 46.

(*a*) It has been held that in an action by the charterer against the shipowner, the plaintiff need not negative the exceptions in the charterparty; and if the defendant relies upon such exceptions he must plead that he comes within them. (*Wheeler* v. *Bavidge*, 9 Ex. 668; but see as to pleading provisoes and exceptions, *Dawson* v. *Wrench*, 3 Ex. 359; *Browne* v. *Knill*, 2 B. & B. 395; 1 Chit. Pl. 7th ed. 311.)

Checks.

See "*Bankers' Checks*," *ante*, p. 89.

Company.

Count by a Company for Calls. (Under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 26 (a).)

(*See the form of commencement, ante, p.* 21.) That the defendant is [*or* was] the holder of —— [*state the number of shares*] shares in the said company, and is as such shareholder indebted to the said company in £——, in respect of a call of £—— [*or* —— calls of £—— each, *state the number and amount of each of the calls*] upon each of the said shares, whereby an action has accrued to the said company, by virtue of the Companies Clauses Consolidation Act, 1845, and the [*state the title of the special act of the company*] to demand and have of and from the defendant the sum of £—— ; yet the defendant has not paid the same.

(*a*) The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, contains the following provisions relating to actions by the company for calls:—By s. 25, if at the time appointed by the company for the payment of any call any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof, in any court of law or equity having competent jurisdiction, and to recover the same, with lawful interest, from the day on which such call was payable. By s. 26, in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act. By s. 27, on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period. By s. 28, the production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares.

Before the C. L. P. Act, 1852, the general form of count given by the Act must have been strictly followed. (*Moore* v. *Metropolitan Sewage Manure Co.*, 3 Ex. 333.) The count must state that the defendant is a shareholder, as the action charges him in this form only upon his liability as a shareholder. (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242; 6 C. B. N. S. 336; and see *Irish Peat Co.* v. *Phillips*, 30 L. J. Q. B. 114, 363.)

Like counts: Birkenhead L. & C. Ry. Co. v. *Wilson*, 3 Ex. 478; *Dublin & Wicklow Ry. Co.* v. *Black*, 8 Ex. 181.

Count for the amount of several calls on the same shares: Newport A. & H. Ry. Co., v. *Hawes*, 3 Ex. 476; *Waterford W. & D. Ry. Co.* v. *Logan*, 19 L. J. Ex. 259; *Cork & Bandon Ry. Co.* v. *Goode*, 13 C. B. 618.

By an Insurance Company registered and incorporated under the 7 & 8 Vict. c. 110, against a Shareholder for Instalments of Capital (a).

(*See the form of commencement, ante*, p. 21.) That at the time of the commencement of this suit the defendant as the holder of ——

The averment that the defendant was and is the holder of the shares, means that he was the holder at the time the call was made. (*Belfast & Down Ry. Co.* v. *Strange*, 1 Ex. 739.) And therefore the form is not applicable to the executor of a deceased shareholder who has died after the calls were made. (*Birkenhead L. & C. Ry. Co.* v. *Cotesworth*, 5 Ex. 226.) In such case the count must be framed according to the fact. A person may be a shareholder within s. 27, although there is not a duly sealed register of shareholders under s. 9. (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 31 L. J. C. P. 184.) As to who is liable to pay the calls upon a sale and transfer of the shares, see *Aylesbury Ry. Co.* v. *Mount*, 4 M. & G. 651. Under this count interest is recoverable by virtue of the statute, s. 22, and it is not necessary to add a count for interest. (*Southampton Dock Co.* v. *Richards*, 1 M. & G. 448; *London & Brighton Ry. Co.* v. *Fairclough*, 2 M. & G. 674.) But care must be taken to claim, at the end of the declaration, an amount sufficient to cover the interest as well as the calls.

Under the Companies Clauses Consolidation Act, a call may be made payable by instalments (*North-Western Ry. Co.* v. *M'Michael*, 6 Ex. 273; *Birkenhead, Lancashire, and Cheshire Junction Ry. Co.* v. *Webster*, 6 Ex. 277); but it seems that the instalments cannot be sued for in the above count until all the instalments are due and payable. (*Ib.*; *Ambergate Ry. Co.* v. *Coulthard*, 5 Ex. 459; and see *ante*, p. 30.)

(*a*) The Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, 7 & 8 Vict. c. 110, repealed in other respects by the Joint Stock Companies Acts, 1856, 1857, is not repealed as respects insurance companies. (See 20 & 21 Vict. c. 80; and see *ante*, p. 21.) It provides for the recovery of instalments of capital by the company against shareholders by s. 55, which enacts that if any shareholder fail to pay any instalment of capital due upon or in respect of any share held by him, when the same shall become due, it shall be lawful for any such company and they are hereby authorized to sue such shareholder for the amount in an action of debt in any court having competent jurisdiction in respect of the same; and that in the declaration in any such action it shall be sufficient to state only that at the time of the commencement of the suit the defendant, as the holder of certain shares (stating how many) in a certain company or undertaking, as the case may be (naming it), was indebted to the company in a certain sum (stating the amount of the instalments, or so much thereof as is sought to be recovered) for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same; and that if upon the trial of any such action it shall be proved that the defendant was the holder of any share when such instalments, or any of them, in respect of the same, and for which the action is brought, became due, then such company shall recover such instalments, or so much thereof as is due, together with interest for the same at the rate of five pounds per centum per annum, to be computed from the day on which such instalment shall have become due.

stating how many) shares in the said —— (*naming it*) company was indebted to the said company in the sum of £—— (*stating the amount of the instalments, or so much thereof as is sought to be recovered*) for certain instalments of capital then due and payable in respect of the said shares, and the defendant has not paid the same.

A like count: London and Continental Assurance Society v. *Redgrave*, 4 C. B. N. S. 524.

Count for Calls by a Company registered under the Joint Stock Companies Acts, 1856, 1857. (19 & 20 *Vict. c.* 47, *and* 20 & 21 *Vict. c.* 14 (*a*).)

(*See the form of commencement, ante*, p. 21.) That the plaintiffs are a company registered and incorporated under the Joint Stock Companies Acts, 1856, 1857, and the defendant is [*or* was] a holder of —— shares in the said company, and is as such shareholder indebted to the plaintiffs in £——, for —— calls of £—— each on each of the said shares, which said calls were duly made by the said company under and according to the said acts upon the defendant, as the holder of the said shares, in respect of moneys unpaid thereon.

Like counts: the New Brunswick Land Co. v. *Muggeridge*, 28 L. J. Ex. 133; 4 H. & N. 160; *Howbeach Coal Co.* v. *Teague*, 29 L. J. Ex. 137; 5 H. & N. 151; *Hull Flax Co.* v. *Wellesley*, 30 L. J. Ex. 5; *Bog Lead Mining Co.* v. *Montague*, 30 L. J. C. P. 380; 10 C. B. N. S. 481.

Count for calls by a company founded on acts of a colonial legislature: Welland Ry. Co. v. *Blake*, 30 L. J. Ex. 161; 6 H. & N. 410; *Welland Ry. Co.* v. *Berrie*, 30 L. J. Ex. 163; 6 H. & N. 416.

Count by the secretary of a company, suing as nominal plaintiff under the company's Act, on the covenant in the deed of settlement of the company for calls: Smith v. *Goldsworthy*, 4 Q. B. 430; *and see ante*, p. 23.

Count by the covenantees in the deed of settlement of a company upon the covenant to pay calls: Hutt v. *Giles*, 12 M. & W. 492; *Aldham* v. *Brown*, 7 E. & B. 164; 29 L. J. Q. B. 33 (*b*).

Count by a Company for Deposits or Back Calls due upon Shares Allotted.

(*See the form of commencement, ante, p.* 21.) That in considera-

(*a*) The Joint Stock Companies Acts, 1856, 1857, do not contain any form of declaration for calls. Under the former of these acts, 19 & 20 Vict. c. 47, s. 22, it is provided that the amount of calls for the time being unpaid on any share shall be deemed to be a debt due from the holder of such share to the company. A general form of count will be sufficient.

A private partnership, as a cost-book mining company, have no power in their own names or in the name of an officer of the company, as the purser of a mine, to sue one of the partners for calls. (*Hybart* v. *Parker*, 27 L. J. C. P. 120; 4 C. B. N. S. 209.)

(*b*) The company can recover in its own name only upon the liability of the defendant as a shareholder, and not upon the covenant in the subscription contract, in respect of which the parties entitled under the covenant

tion that the plaintiffs would allot to the defendant —— of the shares of £—— each, into which the capital of the said company was divided according to the Act of Parliament then constituting the said company, the defendant promised the plaintiffs to pay them the sum of £—— upon each of the said shares; and the plaintiffs allotted —— of the said shares to the defendant accordingly, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to be paid the said sum of £—— on each of the said shares; yet the defendant has not paid the same.

Count by the committee of management against an allottee of shares in a projected company for refusing to pay the deposits: Woolmer v. *Toby*, 10 Q. B. 691.

Count by an allottee of shares against a member of the managing committee of a projected company to recover deposits upon the abandonment of the undertaking: Walstab v. *Spottiswoode*, 15 M & W. 501.

Count on a covenant in the subscription contract to pay expenses in the event of not obtaining an Act: Millett v. *Browne*, 2 H. & N. 837.

Count against a Company for Costs and Expenses incurred in obtaining the Company's Act, under the Companies Clauses Consolidation Act, 1845, 8 *Vict. c.* 16, *s.* 65 (*a*).

(*See the form of commencement, ante, p.* 21.) That before the passing of the —— Act (*the company's special Act*) the plaintiff did, and bestowed work, labour, and services, and paid and expended moneys of the plaintiff to the value and amount of £—— in and about obtaining the said Act, and incident thereto, and after the passing of the said Act, moneys to an amount exceeding the said sum of £——, and applicable to the payment thereof, were raised and received by the defendants by subscriptions of the shareholders, and by loan and otherwise, and all conditions have been fulfilled, and all things have happened, and all times have elapsed, necessary to entitle the plaintiff, according to the said Act, to be paid by the defendants the said £——, for the said work, labour, and services so done and bestowed, and for the said moneys so paid and expended by the plaintiff as aforesaid; yet the defendants have not paid the same.

A like count: Hitchins v. *Kilkenny Ry. Co.*, 9. C. B. 536.

Like counts under special Acts: Tilson v. *Warwick Gas Light Co.*, 4 B. & C. 962; *Carden* v. *General Cemetery Co.*, 5 Bing. N. C. 253.

By a company registered under the Joint Stock Companies Acts,

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only can sue, as the covenantees, and in some cases the secretary, chairman, or other officer of the company entitled to sue by virtue of the Act of the company. (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 28 L. J. C. P. 242.

(*a*) By the Companies Clauses Consolidation Act, 1845; 8 Vict. c. 16, s. 65, it is enacted "That all the money raised by the company—whether by subscription of the shareholders, or by loan, or otherwise—shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto; and secondly, in carrying the purposes of the company into execution."

1856, 1857, *against a contributory for calls made by the official liquidator under the winding-up clauses: Magdalena Steam Nav. Co.* v. *Martin*, 28 L. J. Q. B. 310; *Hull Flax Co.* v. *Wellesley*, 30 L. J. Ex. 5; 6 H. & N. 38; *Anglo-Californian Mining Co.* v. *Lewis*, 30 L. J. Ex. 50; 6 H. & N. 174.

Counts by and against Banking Companies, see ante, pp. 21, 22, 73.

Count against a Railway Company for Compensation under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, *s.* 68.

(*See the form of commencement, ante, p.* 21.) That the defendants are a railway company incorporated by an Act of Parliament passed in the —— year of the reign of Queen Victoria, entitled [an Act for making a railway from —— to —— *stating the title of the Act*]; and the plaintiff is entitled to compensation in respect of an interest in certain land which has been taken by the defendants, as and being the promoters of the undertaking, to make the said railway, for the execution of the works of the said railway; and the defendants, as such promoters as aforesaid, have not made satisfaction to the plaintiff in respect of his interest in the said land under the provisions of the said Act or of any Act incorporated therewith, and the compensation claimed by the plaintiff in respect of his interest in the said land exceeds the sum of fifty pounds; and the plaintiff desiring to have the said compensation settled by jury, gave notice in writing of such his desire to the defendants, as such promoters as aforesaid, stating in the said notice the nature of his interest in the said land in respect of which he claimed compensation, and the amount of compensation so claimed by him, being £——; and the defendants, as such promoters as aforesaid, were not willing to pay the amount of compensation so claimed, nor did they enter into a written agreement for that purpose, nor did they, within twenty-one days after the receipt of the said notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner provided by law; and by reason of such default to issue their warrant as aforesaid, the defendants became and are liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action to recover the last-mentioned sum from the defendants; yet the defendants have not paid the said amount of compensation to the plaintiff.

Like counts: Railstone v. *York, Newcastle, & Berwick Ry. Co.*, 15 Q. B. 404; *Eastham* v. *Blackburn Ry. Co.*, 9 Ex. 758; *Glyn* v. *Aberdare Ry. Co.*, 28 L. J. C. P. 271; 6 C. B. N. S. 359; *Wall* v. *Westminster Palace Hotel Co.*, 8 C. B. N. S. 276.

Counts for compensation under the same Act assessed upon the inquisition found by the sheriff's jury, and for the costs of the inquiry: South-Eastern Ry. Co. v. *Richardson*, 15 C. B. 810; *Chapman* v. *Monmouthshire Ry. Co.*, 27 L. J. Ex. 97; 2 H. & N. 267;

Mortimer v. *South Wales Ry. Co.*, 28 L. J. Q. B. 129; 1 El. & El. 375; *Fletcher* v. *Great Western Ry. Co.*, 28 L. J. Ex. 147.

Count for compensation awarded by arbitration under ss. 23, 68: *Evans* v. *Lancashire & Y. Ry. Co.*, 1 E. & B. 754.

Count for costs of arbitration under s. 34: *Martin* v. *Leicester Waterworks Co.*, 27 L. J. Ex. 432; 3 H. & N. 463; *Yates* v. *Mayor of Blackburn*, 29 L. J. Ex. 447; 6 H. & N. 61.

Count against a railway company for compensation for minerals, the working of which was prevented by the company as likely to damage the works of the railway, under s. 78: *Fletcher* v. *Great Western Ry. Co.*, 28 L. J. Ex. 147; 4 H. & N. 242; 5 H. & N. 689.

Count against a canal company for compensation for mines under the canal, the working of which the company prevented, under a local Act: Swindell v. *Birmingham Canal Co.*, 29 L. J. C. P. 364; 9 C. B. N. S. 241; *and see Queen* v. *Aire and Calder Navigation*, 30 L. J. Q. B. 337.

Counts against a company for neglecting and refusing to register shares. (*See post*, "*Counts in Actions for Wrongs, Company*," ch. 3.)

Count on a bill drawn on a joint stock company with limited liability, omitting the word "limited" from their title, and accepted on behalf of the company by the defendant. (19 & 20 Vict. c. 47, s. 31; *Penrose* v. *Martyn*, 28 L. J. Q. B. 28.)

Action against a promoter of a company provisionally registered on a contract entered into on behalf of the company, but not within the powers of the promoters. (*Job* v. *Lamb*, 25 L. J. Ex. 87; 11 Ex. 539.)

Conditions Precedent (*a*).

General Averment of the Performance of Conditions precedent.

And all conditions were performed, and all things happened, and

(*a*) *Conditions precedent.*]—By the C. L. P. Act, 1852, sect. 57, the plaintiff or the defendant in any action may aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest.

Until this great improvement was effected, the pleader was obliged anxiously to determine what were conditions precedent to the right of action, etc., and to aver their performance with certainty and particularity. (Steph. Pl. 6th ed. 259; and see *Manby* v. *Cremonini*, 6 Ex. 808.) If any condition precedent was omitted by mistake or oversight, he was exposed to a demurrer, and the pleading was liable to be held irremediably bad on motion for arrest of judgment, or for judgment *non obstante veredicto*, or on error; and if he inserted any unnecessarily, he was exposed to immaterial issues being raised, which he could escape from only by the danger and delay of a demurrer, or by consenting to have the allegation struck out of his declaration, and thus taking upon himself all the risk of the omission. The former practice was further productive of great expense and inconvenience by prompting the other side to traverse the several averments inserted, although wholly beside the merits of the case, and the questions really in dispute; and this most frequently occurred in those cases where there was least excuse for it, namely, where the chances of

all times elapsed, necessary to entitle the plaintiff to [have the agreed cargo loaded on board the said ship (*see C. L. P. Act*, 1852, *Sched. B., form* 22), *or as the case may be, or*] a performance of the said promise [*or* agreement *or* covenant] of the defendant, and to maintain this action for the breach thereof hereinafter alleged; [*where there are negative conditions also, add:* and nothing happened to prevent the plaintiff from maintaining this action for the same *or* for the breach hereinafter alleged.]

Like forms: Eastern Counties Ry. v. *Philipson*, 16 C. B. 7; *Hill* v. *Mount*, 18 C. B. 72; *Bamberger* v. *Commercial Mutual Ass. So.*, 15 C. B. 676; 24 L. J. C. P. 115.

General Averment, excusing some, and stating the Performance of all other Conditions precedent.

And before and at the time for [payment of the said £—— by the plaintiff, the defendant excused the plaintiff from paying or tendering the same, *state thus the conditions excused, and the mode by which they were excused*], and except as aforesaid, all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach of the said promise [*or* agreement *or* covenant] hereinafter alleged.

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defence were summed up in instructions to deny all the allegations in the declaration.

At present the general averment of the performance of conditions precedent prevents all danger of a demurrer, etc.; the opposite pleader is not tempted to raise unnecessary issues, and must take upon himself to maintain the materiality of those which he proposes to raise; whilst, at the same time, the provision which obliges him to raise distinct issues, and precludes him from denying the general averment with like generality, preserves the distinctness of the issues on the record, gives notice beforehand of the points to be contested at the trial, and still enables the parties, when it is important to do so, to raise the question of materiality by demurrer, or by motion in arrest of judgment, or by error.

Where a condition has not in fact been performed the above general averment would be untrue, and might be met by a denial of the particular condition unsatisfied. The excuse which the party may have for dispensing with the non-performance could not be set up in answer to this denial, and in support of his original averment of the performance of all conditions; for this would be a departure in pleading. In the case therefore of any necessary condition remaining unperformed, the party must state the matter of excuse in the first instance. This was the rule before the above enactment, and it is not altered by it. (Co. Lit. 304, a; *Manby* v. *Cremonini*, 6 Ex. 808; *Cort* v. *Ambergate Ry. Co.*, 20 L. J. Q. B. 460.) The conditions excused and the excuses of performance must be averred with particularity, and not in a general form. (*London Dock Co.* v. *Sinnott*, 8 E. & B. 347.) Where the condition is contained in an instrument under seal the discharge of it by the other party must also be under seal, but need not be so averred in the declaration. (*Thames Haven Dock Co.* v. *Brymer*, 5 Ex. 696: and see *Lamprell* v. *Billericay Union*, 3 Ex. 283.)

The general averment of the performance and happening of all things necessary to the plaintiff's right of action, imports a sufficient statement of his being ready and willing to do all things necessary to be done on his part in future. (*Bentley* v. *Dawes*, 9 Ex. 666.) But the general averment of readiness and willingness is not sufficient in the case of a condition precedent. (*Roberts* v. *Brett*, 6 C. B. N. S. 611, 633.)

General Averment where the Performance of some of the Conditions precedent has been prevented by the Defendant's breach of the Contract.

And the plaintiff has always been ready to perform the said agreement [*or* covenant] on his part, and has performed the same, except so far as he was prevented from so doing by the defendant's breach of the said agreement [*or* covenant] hereinafter mentioned; and, except as aforesaid, all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach of the said agreement by the defendant hereinafter alleged.

Copyhold Fines.

Indebitatus Count for Copyhold Fines, (*C. L. P. Act,* 1852, *Sched. B.* 11.)

Money payable by the defendant to the plaintiff for fines payable by the defendant, as tenant of customary tenements of the manor of ——, to the plaintiff, as lord of the said manor, for the admission of the defendant into the said customary tenements.

A like count: Pochin v. *Duncombe,* 1 H. & N. 842.

A like count for fines on the surrender of copyhold tenements: Hayward v. *Raw,* 30 L. J. Ex. 178; 6 H. & N. 308 (*a*).

Indebitatus Count by the Steward of a Manor for Fees.

Money payable by the defendant to the plaintiff for work done and materials provided by the plaintiff, as steward of the court of the manor of ——, for the defendant, at his request, and for fees payable by the defendant to the plaintiff in respect thereof.

Covenant.

See post, "*Landlord and Tenant,*" "*Mortgage,*" "*Sale of Land.*"

Crops.

Indebitatus Count for Crops sold.

Money payable by the defendant to the plaintiff for crops bargained and sold by the plaintiff to the defendant.

Indebitatus count for crops sold and depastured by cattle: Poulter v. *Killingbeck,* 1 B. & P. 397; *and see* "*Agistment,*" *ante,* p. 54.

(*a*) An indebitatus count will not lie for arbitrary copyhold fines, before an assessment of a certain and reasonable amount. (*Hayward* v. *Raw, supra.*)

Indebitatus Count for Work and Labour expended in Cultivation by an outgoing Tenant.

Money payable by the defendant to the plaintiff for the plaintiff having left and given up, for and to the defendant, at his request, the benefit of work done, and materials, seeds, manures, crops, tillages, and other things provided, and moneys expended, by the plaintiff, in cultivating and improving certain lands.

Like counts: Muncey v. *Dennis*, 26 L. J. Ex. 66; 1 H. & N. 216; *Clarke* v. *Westrope*, 25 L. J. C. P. 287; 18 C. B. 765; *Price* v. *Harrison*, 29 L. J. C. P. 335.

Special Count by an outgoing Tenant against the Landlord for Tillages, etc., according to the custom of the country.

That the plaintiff became and was tenant to the defendant of a farm and land upon the terms, that the plaintiff should, during the said tenancy, till and cultivate the said farm and land in a husbandlike manner according to the custom of the country where the same were situate, and that the defendant should, at the expiration of the said tenancy, pay to the plaintiff all such reasonable allowances as the plaintiff as offgoing tenant should, according to the said custom, be entitled to receive from the defendant, in respect of any tillages, sowing, or cultivation, by the plaintiff of the said farm, according to the said custom, the benefit whereof should be given up by the plaintiff to the defendant; and during the said tenancy the plaintiff bestowed his work and labour in tilling, sowing, and cultivating the said farm in a husbandlike manner, and according to the said custom, and at the expiration of the said tenancy the benefit thereof was given up by the plaintiff to the defendant, and the plaintiff as offgoing tenant was then, according to the said custom, entitled to receive from the defendant reasonable allowances amounting to £——, in respect of the said tillages, sowing, and cultivation of the said farm, of all which premises the defendant had notice, but did not pay the same.

Like counts on tenancies under agreements not under seal: Hutton v. *Warren*, 1 M. & W. 466; *Dalby* v. *Hirst*, 1 B. & B. 224; *Faviell* v. *Gaskoin*, 7 Ex. 273; *Cumberland* v. *Bowes*, 15 C. B. 348; *Womersley* v. *Dally*, 26 L. J. Ex. 219.

A like count on a covenant in a deed: Newson v. *Smythies*, 28 L. J. Ex. 97.

By landlord against incoming tenant for the benefit of manure, etc., according to the custom of the country: Clarke v. *Roystone*, 13 M. & W. 752.

By landlord against incoming tenant for growing crops, tillages, etc., to be paid for by agreement at a valuation: Earl Falmouth v. *Thomas*, 1 C. & M. 89; *Price* v. *Harrison*, 29 L. J. C. P. 335.

By outgoing against incoming tenant for a valuation of crops relinquished to the latter: Leeds v. *Burrows*, 12 East, 1 (*a*).

(*a*) It seems that in some cases the incoming tenant may become liable to the outgoing tenant, on an implied contract, by taking possession of the crops and tillages for his own benefit; although *primâ facie* the contract is with the landlord. (*Faviell* v. *Gaskoin*, 7 Ex. 273, 280; and see *Boraston* v. *Green*, 16 East, 71.)

DAMAGES. *See ante, p. 7; and see post, "Liquidated Damages."*

DEMURRAGE. *See ante, p. 109.*

EXCHANGE.

Indebitatus Count on a Contract of Exchange.

Money payable by the defendant to the plaintiff for money agreed by the defendant to be paid by him to the plaintiff, together with goods of the defendant delivered by the defendant to the plaintiff in exchange for goods of the plaintiff, delivered by the plaintiff to the defendant. [*The common count for goods sold and delivered would in some cases suffice: Sheldon* v. *Cox*, 3 B. & C. 420, *and see ante, p.* 31, n (*a*).]

Special Count on a Contract of Exchange.

That in consideration that the plaintiff would deliver to the defendant a horse of the plaintiff in exchange for a horse of the defendant and £—— to be paid by the defendant to the plaintiff, the defendant promised the plaintiff to deliver the last-mentioned horse to the plaintiff and to pay him the said £——; and the plaintiff thereupon delivered to the defendant the said horse of the plaintiff on the terms aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said horse of the defendant delivered to him, and to be paid the said £——; yet the defendant did not deliver to the plaintiff the said horse of the defendant, or pay the plaintiff the said £——.

Special count on a contract of exchange: Parker v. *Rawlings*, 4 Bing. 280.

Special count against an executor on a contract of exchange with the testator: Siboni v. *Kirkman*, 1 M. & W. 418.

On a Contract of Exchange after a Breach of Warranty.

That before the making of the agreement hereinafter mentioned, the defendant, by warranting a horse to be sound, had sold the said horse to the plaintiff for a certain price to be paid by the plaintiff to the defendant, and had delivered the same to the plaintiff; and the plaintiff afterwards complained to the defendant that the said horse was not then sound; and it was thereupon agreed by and between the plaintiff and the defendant, that the plaintiff should return the said horse to the defendant, and the defendant should take back the same, and should deliver to the plaintiff another horse in lieu

thereof; and all conditions were performed, and all things happened and all times elapsed, necessary to entitle the plaintiff to have the said other horse delivered to him by the defendant; yet the defendant has not delivered the said other horse to the plaintiff, whereby the plaintiff has been deprived of the same, and has been put to divers expenses in the keeping and taking care of the first-mentioned horse.

Special count on a breach of warranty of goods given in exchange. Fairmaner v. *Budd*, 7 Bing. 574; *Smith* v. *Battams*, 26 L. J. Ex. 232.

Executors and Administrators.

Indebitatus Count by an Executor or Administrator on Causes of Action accrued to the Deceased (*a*).

(*Commence with one of the forms, ante*, pp. 12, 14.) Money payable by the defendant to the plaintiff, as executor [*or* administrator]

(*a*) *Actions by executors and administrators.*]—An executor or administrator may sue upon all *personal* contracts made with the testator, in respect of the damages accrued to the personal estate from the breach of them (1 Wms. Saund. 217,) and whether the breach occurred before or after the testator's death; but for breaches of contract which affect the person of the testator only, and not his transmissible personal estate, as a breach of promise to marry where there is no special damage to the estate, an executor or administrator cannot sue. (*Chamberlain* v. *Williamson*, 2 M. & S. 408; 1 Wms. Exs. 5th ed. 700, 713.)

Contracts with a testator affecting his *real* estate, and which run with the land, as covenants for title, covenants to repair, etc., pass with the reversion to the heir or devisee if the reversion be freehold, and to the executor where the reversion is a chattel interest in the land. And in the former case, if the testator has not sued for breaches of such covenants in his lifetime, the executor cannot sue afterwards, unless in respect of some distinct loss or injury to the testator's personal estate. In all other cases the heir or devisee of the reversion only can sue, in respect of breaches after the testator's death. (*Kingdon* v. *Nottle*, 1 M. & S. 355; *Jones* v. *King*, 4 M. & S. 188; 5 Taunt. 418; and see Wms. Exs. 5th ed. 714, 721.)

A plaintiff cannot join, in the same declaration or count, a claim as executor or administrator with a claim in his own right, and a declaration uniting such claims would be bad on general demurrer, or in arrest of judgment, or on error. (2 Wms. Saund. 117 *e*; 2 Wms. Exs. 5th ed. 1697.) And the C. L. P. Act, 1852, which allows different kinds of causes of action to be joined, is limited to those which are by and against the same parties and in the same rights. But a plaintiff suing as executor may join any claims, in respect of which the money recoverable would be *assets*. (Ib.) Hence the second of the above counts, on causes of action accruing to the executor or administrator since the decease, may be added to the first count, on causes of action accrued to the deceased. (Ib.; *Cowell* v. *Watts*, 6 East, 405; *Edwards* v. *Grace*, 2 M. & W. 190; *Dowbiggin* v. *Harrison*, 9 B. & C. 666; *Jobson* v. *Forster*, 1 B. & Ad. 6.)

Where the cause of action arose in the lifetime of the deceased, the executor or administrator must declare in his representative character.

as aforesaid, for goods sold and delivered by the said *C. D.* to the defendant, and for goods bargained and sold by the said *C. D.* to the defendant, and for work done and materials provided by the said *C. D.* for the defendant at his request, and for money lent by the said *C. D.* to the defendant, and for money paid by the said *C. D.* for the defendant at his request, and for money received by the defendant for the use of the said *C. D.*, and for interest upon money due from the defendant to the said *C. D.*, and forborne at interest by the said *C. D.* to the defendant at his request, and for money found to be due from the defendant to the said *C. D.* on accounts stated between them.

Indebitatus Count by an Executor or Administrator on Causes of Action accrued since the death of the Deceased.

(*Commence with one of the forms, ante*, pp. 12, 14.) Money payable by the defendant to the plaintiff as executor [*or* administrator] as aforesaid for goods sold and delivered by the plaintiff as executor [*or* administrator] as aforesaid to the defendant, and for goods bargained and sold by the plaintiff as executor [*or* administrator] as aforesaid to the defendant, and for work done and materials provided by the plaintiff as executor [*or* administrator] as aforesaid for the defendant at his request, and for money lent by the plaintiff as executor [*or* administrator] as aforesaid to the defendant, and for money paid by the plaintiff as executor [*or* administrator] as aforesaid for the defendant at his request, and for money received by the defendant for the use of the plaintiff as executor [*or* administrator] as aforesaid, and for interest upon money due from the defendant to the plaintiff as executor [*or* administrator] as aforesaid and forborne at interest by the plaintiff as executor [*or* administrator] as aforesaid to the defendant at his request, and for money found to be due from the defendant to the plaintiff as executor [*or* administrator] as aforesaid upon accounts stated between the plaintiff as executor [*or* administrator] as aforesaid and the defendant.

(2 Wms. Exs. 5th ed. 1695.) Where the cause of action arose wholly after the death, the executor or administrator may sue either in his own name personally (as being the party contracted with), or in his representative character if the money to be recovered would be assets of the estate. (Ib.; *Aspinall* v. *Wake*, 10 Bing. 51.) If the executor sues in his own name personally, he would be exposed to a set-off of any debt due from himself to the defendant.

An executor may commence an action before probate, and it is sufficient if he obtains probate in time to support his title, in case it should be disputed. But the letters of administration must issue before the administrator can commence an action, for without them he has no right of action. (1 Wms. Exs. 5th ed. 260, 353.) As to the title of an executor or administrator relating back to the death, see 1 Wms. Exs. 5th ed. 555; *Foster* v. *Bates*, 12 M. & W. 226; *Bodger* v. *Arch*, 10 Ex. 333; *Welchman* v. *Sturgis*, 13 Q. B. 552.

By 3 & 4 Will. IV. c. 42, s. 31, executors and administrators suing in right of the testator or intestate are made liable to pay costs in case of being nonsuited or a verdict passing against them, unless the court or a judge shall otherwise order.

Indebitatus Count against an Executor or Administrator on Causes of Action accrued against the Deceased in his lifetime (a).

(*Commence with one of the forms, ante,* pp. 13, 15.) Money payable by the defendant as executor [*or* administrator] as aforesaid to the

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(*a*) *Actions against executors and administrators.*]—The executor is in general liable upon all contracts made by the testator for breaches before or after the death. *Wilson* v. *Wigg*, 10 East, 313; *Wollaston* v. *Hakewill*, 3 M. & G. 320; 2 Wms. Exs. 5th ed. 1557.)

But it is said that no action will lie against an executor for the non-performance by the testator of an act strictly personal, as for the breach of a promise to marry; (see *Chamberlain* v. *Williamson*, 2 M. & S. 408; 1 Ch. Pl. 7th ed. 58.)

Contracts of agency or for personal services are in general revoked by death; and the executor cannot be sued upon them except for past breaches. (*Werner* v. *Humphreys*, 2 M. & G. 853; *Campanari* v. *Woodburn*, 15 C. B. 400; per Parke B. *Siboni* v. *Kirkman*, 1 M. & W. 418, 423; 2 Wms. Exs. 5th ed. 1560.) Where a contract, which is not rescinded by death, is made with a person who dies before it is completed, and it is completed after his death, the declaration in an action upon the contract against the executor or administrator of the deceased party, must state the contract specially as made with the deceased, and aver the completion after his death, and the breach by the defendant; (see *Corner* v. *Shew*, 3 M. & W. 350; *Campanari* v. *Woodburn*, 15 C. B. 400.)

An executor cannot be liable as executor for goods sold to him, or work done at his request, or for money received by him for the use of the plaintiff. (Counts charging him as executor on these causes of action are construed as counts against him personally in his own right. *Ashby* v. *Ashby*, 7 B. & C. 444; *Corner* v. *Shew*, 3 M. & W. 350.) An executor may be liable in his representative capacity on accounts stated, and also for money paid for him as executor at his request. (*Ashby* v. *Ashby*, 7 B. & C. 444; 2 Wms. Exs. 5th ed. 1755.) And these counts may be joined with the above count upon causes of action accrued before the death. (Ib.; *Powell* v. *Graham*, 7 Taunt. 580.)

Counts charging the defendant as executor or administrator cannot be joined with counts charging him personally in his own right; and a declaration uniting such counts would be bad on demurrer, or in arrest of judgment, or on error. (*Wigley* v. *Ashton*, 3 B. & Ald. 101; *Hayter* v. *Moat*, 2 M. & W. 56; *Corner* v. *Shew*, 3 M. & W. 350; *Ashby* v. *Ashby*, 7 B. & C. 444; 2 Wms. Exs. 5th ed. 1753.) Nor can such causes of action be joined in the same count. (*Kitchenman* v. *Skeel*, 3 Ex. 49.) And the C. L. P. Act, 1852, s. 41, which allows different kinds of causes of action by and against the same parties in the same rights to be joined, does not extend to such cases; see ante p. 6, n (*e*).

An executor cannot be sued at law as such for legacies, whether general or specific. (*Deeks* v. *Strutt*, 5 T. R. 690; *Jones* v. *Tanner*, 7 B. & C. 542; and see 2 Wms. Exs. 5th ed. 1746.) But after assent by an executor to a specific legacy, he is liable at law to an action by the legatee, because the property vests in the legatee upon the assent. (*Williams* v. *Lee*, 3 Atk. 223.) So in the case of a general pecuniary legacy, after the executor has admitted to the legatee that he has received the money, and holds it to the use of the legatee, it becomes a debt to the latter, who may recover it in an action. (*Topham* v. *Morecraft*, 8 E. & B. 972; and see 2 Wms. Exs. 5th ed. 1749; (*Whitehouse* v. *Abberly*, 1 C. & K. 642.)

By the 9 & 10 Vict. c. 95, s. 65, and 13 & 14 Vict. c. 61, s. 1, the jurisdiction of the County Courts extends to the recovery of any demand not exceeding the sum of £50, which is the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will

plaintiff for goods sold and delivered by the plaintiff to the said *G. H.*, and for goods bargained and sold by the plaintiff to the said *G. H.*, and for work done and materials provided by the plaintiff for the said *G. H.* at his request, and for money lent by the plaintiff to the said *G. H.*, and for money paid by the plaintiff for the said *G. H.* at his request, and for money received by the said *G. H.* for the use of the plaintiff, and for interest upon money due to the plaintiff from the said *G. H.* and forborne at interest by the plaintiff to the said *G. H.* at his request, and for money found to be due from the said *G. H.* to the plaintiff on accounts stated between the plaintiff and the said *G. H.*

Indebitatus Count against an Executor or Administrator on Causes of Action accruing after the Death of the Testator.

(*Commence with one of the forms, ante*, pp. 13, 15.) Money payable by the defendant as executor [*or* administrator] as aforesaid to the plaintiff for money paid by the plaintiff for the defendant as executor [*or* administrator] as aforesaid at his request, and for money found to be due from the defendant as executor [*or* administrator] as aforesaid to the plaintiff upon accounts stated between the plaintiff and the defendant as executor [*or* administrator] as aforesaid.

Against an administrator on a contract for the sale of goods made with the testator for not accepting the goods after the death: Wentworth v. *Cock*, 10 A. & E. 42.

Against an administrator on a special contract of agency made with the intestate and performed after his death: Campanari v. *Woodburn*, 15 C. B. 400.

Indebitatus Count by Husband and Wife Executrix or Administratrix (*a*).

(*Commence with one of the forms, ante*, pp. 17, 18.) Money payable by the defendant to the said *A. B.* and *C.* his wife as executrix [*or* administratrix] as aforesaid for goods sold and delivered by the

(see *Longbottom* v. *Longbottom*, 8 Ex. 203; *Hewston* v. *Phillips*, 11 Ex. 699), except where the validity of any devise, bequest, or limitation, under any will, may be disputed, 9 & 10 Vict. c. 95, s. 58; in which cases there is no jurisdiction, unless the parties consent (19 & 20 Vict. c. 108, s. 23).

By the Statute of Frauds, (29 Car. II. c. 8, s. 4,) it is enacted that "no action shall be brought whereby to charge an executor or administrator, upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(*a*) Where a married woman is executrix her husband must be joined in all actions by and against her. She cannot obtain probate or administer without the consent of her husband; but the personal estate of the deceased vests in her immediately upon the death, and a payment or delivery of the property to her made *bonâ fide*, before the dissent of the husband and before probate is valid. (*Pemberton* v. *Chapman*, 7 E. & B. 210.)

said *D. E.* to the defendant, and for money received by the defendant to the use of the said *D. E.*, and for money found to be due from the defendant to the said *D. E.* upon accounts stated between them, and for money found to be due from the defendant to the said *A. B.* and *C.* his wife as executrix [*or* administratrix] as aforesaid upon accounts stated between the defendant and the said *A. B.* and *C.* his wife as executrix [*or* administratrix] as aforesaid.

A count against husband and wife executrix or administratrix may be easily framed from the above and preceding forms.

Other counts by and against executors, post, "*Landlord and Tenant,*" pp. 180, 183.

FACTOR. *See* "*Agent,*" pp. 50, 51.

FARRIER.

Against a Farrier [*or Veterinary Surgeon*] *for not using due care, etc., in his treatment of the Plaintiff's Horse, which was lame.*

That in consideration that the plaintiff employed the defendant as and being a farrier [*or* veterinary surgeon] to treat and endeavour to cure a horse of the plaintiff then labouring under [lameness], for reward to the defendant, the defendant promised the plaintiff to use due and proper care and skill in treating and endeavouring to cure the said horse; yet the defendant did not use due or proper care or skill in treating and endeavouring to cure the said horse, and so carelessly, ignorantly, and unskilfully treated it, that by means thereof it became and was more [lame] and wholly incurable, and of no use or value to the plaintiff.

FIXTURES.

Indebitatus Count for the Price of Fixtures (*a*).

Money payable by the defendant to the plaintiff for fixtures and goods sold and given up by the plaintiff to and for the defendant.

Count upon a lease allowing the lessee a reasonable time after the

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(*a*) When a person who was entitled to the right of removing his fixtures has sold them and given up possession to the purchaser, he may recover the price under this count. (*Hallen* v. *Runder*, 1 C. M. & R. 266; where see also a special count on the same cause of action.) The price of fixtures *as such* cannot be recovered under the common count for goods sold and delivered (*Lee* v. *Risdon*, 7 Taunt. 189); but it would be otherwise if they had been first removed. (See *Wilde* v. *Waters*, 16 C. B. 637; *Dalton* v. *Whittem*, 3 Q. B. 961; *Pitt* v. *Shew*, 4 B. & Ald. 206.)

expiration of the lease for the removal of the fixtures, for preventing him from removing them: Stansfeld v. *Portsmouth*, 27 L. J. C. P. 124; 4 C. B. N. S. 120.

Forbearance (*a*).

On a Promise by the Defendant to pay a Debt and Costs, if the Plaintiff would stay Proceedings in an Action.

That the defendant was indebted to the plaintiff in £——, and the plaintiff had commenced an action against the defendant in the court of ——, for the recovery of the said debt; and thereupon in consideration that the plaintiff would stay all further proceedings in the said action until the —— day of ——, A.D. ——, the defendant promised the plaintiff to pay him the said debt and his costs of suit in the said action on or before the last-mentioned day; and the plaintiff thereupon stayed all further proceedings in the said action until the last-mentioned day, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said debt and the said costs of suit; yet the defendant has not paid the same.

A like count: Wade v. *Simeon*, 2 C. B. 548.

A like count by an executor: Tanner v. *Moore*, 9 Q. B. 1.

On a promise to the assignee of a bond to pay the debt by instalments, etc., in consideration of forbearance: Morton v. *Burn*, 7 A. & E. 19.

On a promise to pay a sum of money in consideration of plaintiff withdrawing a claim upon a disputed account: Llewellyn v. *Llewellyn*, 3 D. & L. 318; *and see Edwards* v. *Baugh*, 11 M. & W. 641.

On a promise to pay a sum of money in consideration of releasing a ship detained to answer a claim for damages: Longridge v. *Dorville*, 5 B. & Ald. 117.

On a guarantee for the payment of a debt on a certain day in consideration of forbearance of proceedings against the debtor: Rolt v.

(*a*) Forbearance of an action commenced for a *bonâ fide* claim is a sufficient consideration for a promise, as the forbearing a suit instituted to try a doubtful question of law. (*Longridge* v. *Dorville*, 5 B. & Ald. 117.) But forbearing a suit in which the plaintiff had no cause of action and knew it, will not support a promise; (*Wade* v. *Simeon*, 2 C. B. 548; and see *Smith* v. *Monteith*, 13 M. & W. 427.)

Where a claim is *bonâ fide* made, respecting which a reasonable doubt exists, forbearing to sue is a good consideration, although no proceedings have been commenced. (*Cook* v. *Wright*, 30 L. J. Q. B. 231; 1 B. & S. 559.) Forbearing to sue for an alleged balance of unsettled accounts as to which there was a dispute between the plaintiff and defendant, is a good consideration for a promise (*Llewellyn* v. *Llewellyn*, 3 D. & L. 318); but where there was merely a dispute whether the defendant was indebted to the plaintiff, without any foundation appearing for the dispute, forbearance to sue was

Cozens, 25 L. J. C. P. 254; 18 C. B. 673; *Smith* v. *Algar*, 1 B. & Ad. 603; *Payne* v. *Wilson*, 7 B. & C. 423; *Tanner* v. *Moore*, 9 Q. B. 1; *and see form, post*, p. 139.

FREIGHT. *See* "*Carriers by Water*," *ante*, p. 108.

FRIENDLY SOCIETIES (*a*).

Indebitatus Count by the Trustees of a Friendly Society.

(*Commence with the form, ante*, p. 24.) Money payable by the defendant to the plaintiffs as trustees of the said society, for money

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held not to constitute a sufficient consideration. (*Edwards* v. *Baugh*, 11 M. & W. 641.)

Forbearing to sue for immediate payment of a debt, no time being specified, has been held a good consideration. (*Oldershaw* v. *King*, 27 L. J. Ex. 120; 2 H. & N. 517.) It seems that forbearance to sue for a reasonable time would form a good consideration. (Ib.; but see *Semple* v. *Pink*, 1 Ex. 74, where it was suggested that the term, reasonable time, could have no application in reference to forbearance to sue.)

(*a*) The principal statutes relating to friendly societies in general are:—10 Geo. IV. c. 56; 4 & 5 Will. IV. c. 40; 9 & 10 Vict. c. 27; and 13 & 14 Vict. c. 115. But these were all repealed, except in part as to then existing societies, by 18 & 19 Vict. c. 63, by which statute, amended by 21 & 22 Vict. c. 101, and by 23 & 24 Vict. c. 58, friendly societies are now regulated.

The Statutes relating to industrial and provident societies are the "Industrial and Provident Societies Act, 1852," 15 & 16 Vict. c. 31, (which incorporates the laws relating to friendly societies so far as applicable); 17 & 18 Vict. c. 25; and 19 & 20 Vict. c. 40.

Loan societies are regulated by the statutes 5 & 6 Will. IV. c. 23; 3 & 4 Vict. c. 110; continued by 21 & 22 Vict. c. 19.

Benefit building societies are regulated by 6 & 7 Will. IV. c. 32.

See Chitty's statutes; 3 Stephens' Com. 4th ed. 200.

By the Act to Consolidate and Amend the Law Relating to Friendly Societies, (18 & 19 Vict. c. 63, s. 18,) "all real and personal estate whatsoever belonging to any such society shall be vested in the trustee or trustees for the time being, for the use and benefit of such society and the members thereof; and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustee or trustees, their respective executors or administrators, according to their respective claims and interest—and in all actions or suits touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee in his or their proper name or names, as trustees of such society, without any further description."

By s. 19, "the trustee or trustees of any such society are authorized to bring or defend, or cause to be brought or defended, any action, suit, or prosecution, in any court of law or equity, touching or concerning the property, right, or claim to property of the society, for which he or they are

lent by the plaintiffs as trustees as aforesaid to the defendant, and for money received by the defendant for the use of the plaintiffs as trustees as aforesaid, and for interest upon money due from the defendant to the plaintiffs as trustees as aforesaid and forborne at interest by the plaintiffs as trustees as aforesaid to the defendant at his request, and for money found to be due from the defendant to the plaintiffs as trustees as aforesaid on accounts stated between them.

Like counts: Dewhurst v. *Clarkson*, 3 E. & B. 194; *Sinden* v. *Bankes*, 30 L. J. Q. B. 102.

Count by the trustees of a loan society on a promissory note made as security for a loan: Bradburye v. *Whitbread*, 5 M. & G. 439 (*a*).

Counts by the trustees of a benefit building society on a covenant

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such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real and personal property of such society, sue and be sued, plead and be impleaded in any court of law or equity, in his or their proper name or names, as trustee or trustees of such society, without other description; and no such action, suit, or prosecution shall be discontinued or shall abate by the death of such person, or his removal from the office of trustee; but the same shall and may be proceeded in by or against the succeeding trustee or trustees as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the action or suit or prosecution had been commenced in his or their name or names, for the benefit of, or to be reimbursed from the funds of such society."

By the Act to Amend the Industrial and Provident Societies Act, 1852, 17 Vict. c. 25, s. 1, it is enacted that "after the passing of this Act, no suit or proceeding shall be commenced or prosecuted by or against the trustees of any society registered under the Industrial and Provident Societies Act, 1852, except in the case hereinafter provided; but all suits and proceedings, whether at law or in equity, by or on behalf of any such society, against any person or persons, whether bodies politic or others, and whether members or not of such society, shall be commenced and prosecuted in the name of one of the two officers, for the time being, appointed to sue and be sued on behalf of such society, and registered in pursuance of the directions for such appointment and registration respectively hereinafter contained; and all suits and proceedings, whether at law or in equity, or by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such society, against such society, shall be commenced and prosecuted against such officers, or if there shall be no such officer for the time being, then against the trustees of the said society."

The members of a society registered under the Industrial and Provident Societies Act, 1852, are not liable to be sued for the debts of the society, but only the officers or trustees under the above enactment. (*Burton* v. *Tannahill*, 25 L. J. Q. B. 135; 5 E. & B. 797; and see *Alexander* v. *Worman*, 30 L. J. Ex. 198; 6 H. & N. 100.) The individual members may be proceeded against by *scire facias* on judgments obtained against the officers or trustees of the society. (*Myers* v. *Rawson*, 29 L. J. Ex. 247; 5 H. & N. 99.)

The trustees and secretary of a benefit building society making a promissory note in their own names, but describing themselves as trustees and secretary, are liable personally. (*Price* v. *Taylor*, 5 H. & N. 540.)

(*a*) No action is maintainable by the treasurer or clerk for the time being

to pay subscriptions, contained in a mortgage deed made by a member of the society: Cutbill v. *Kingdom*, 1 Ex. 494; *Morrison* v. *Glover*, 4 Ex. 430; *Reeves* v. *White*, 17 Q. B. 995; *Farmer* v. *Giles*, 30 L. J. Ex. 65; 5 H. & N. 753. *And see as to liability for subscriptions, Ib., Farmer* v. *Smith*, 28 L. J. Ex. 226; 4 H. & N. 196.

Indebitatus count against the trustees of a benefit building society: Card v. *Carr*, 1 C. B. N. S. 197.

Funeral Expenses (*a*).

Indebitatus Count for Funeral Expenses.

Money payable by the defendant to the plaintiff for work done and materials provided, and a hearse, coaches, horses, goods, and necessary things furnished by the plaintiff for the defendant, at his request, in and about a funeral [*add the common counts for goods sold and money paid*].

Like counts: Green v. *Salmon*, 8 A. & E. 348; *Lucy* v. *Walrond*, 3 Bing. N. C. 841.

Garnishee. *See "Attachment of Debt," ante*, p. 66.

Goods. *See "Goods Sold and Delivered," ante*, p. 31; *"Goods Bargained and Sold," ante*, p. 32; *"Sale of Goods," post.*

Goodwill. *See post, "Trade."*

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of a loan society on a note or security made payable to him under the Loan Societies Act, 5 & 6 Will. IV. c. 23, s. 8; or 3 & 4 Vict. c. 110, s. 16 (*Timms* v. *Williams*, 3 Q. B. 413); but the trustees of the society might sue on such a note under 5 & 6 Will. IV. c. 23, s. 4. (*Albon* v. *Pyke*, 4 M. & G. 421. And see 3 & 4 Vict. c. 110, s. 8; and 13 & 14 Vict. c. 115, s. 13.)

(*a*) It is the duty of an executor to bury his testator, and in case of necessity he becomes personally liable to the undertaker on an implied contract to pay the expenses of the funeral, without any express order given by him. (*Tugwell* v. *Heyman*, 3 Camp. 298; *Rogers* v. *Price*, 3 Y. & J. 28; *Corner* v. *Shew*, 3 M. & W. 350, 356.) But the executor is only liable for the expenses of a funeral suitable to the degree of the testator, unless he has himself ordered or sanctioned a greater expense. (*Green* v. *Salmon*, 8 A. & E. 348; *Brice* v. *Wilson*, 8 A. & E. 349; *Lucy* v. *Walrond*, 3 Bing. N. C. 841.)

A husband is liable for the expenses of his wife's funeral; and where a

Guarantees (*a*).

On a Guarantee for the Price of Goods supplied to a third Person.

That in consideration that the plaintiff would sell and deliver goods to *G. H.* on credit [*or* on the usual terms of dealing between them], the defendant guaranteed and promised the plaintiff to be responsible to him for the due payment of the price of the said goods [*or* to the extent of £——, *according to the legal effect of the guarantee*]; and the plaintiff accordingly sold and delivered goods to the said *G. H.* on credit [*or* on the usual terms of dealing be-

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person in his absence voluntarily employs an undertaker and pays the expense of the funeral of the wife, he may recover the amount from the husband as money paid to his use. (*Jenkins* v. *Tucker*, 1 H. Bl. 90; *Ambrose* v. *Kerrison*, 10 C. B. 776.) An infant widow may render herself liable for the funeral of her deceased husband as for necessaries. (*Chapple* v. *Cooper*, 13 M. & W. 252.)

(*a*) The Statute of Frauds, 29 Car. II. c. 3, s. 4, provides "That no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This only affects the evidence of the contract, and not the mode of pleading it.

By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, "no special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

Under this section the consideration for the promise may be proved by parol evidence, but the promise must still be complete in the writing under the Statute of Frauds, and the parol evidence admissible to prove the consideration cannot be used to explain the written promise. (*Holmes* v. *Mitchell*, 28 L. J. C. P. 301; 7 C. B. N. S. 361.) A written guarantee (where the subject-matter of the contract makes it liable to an agreement stamp) is not exempt merely by reason of the consideration not being contained in the writing but proved by parol evidence. (*Glover* v. *Hackett*, 26 L. J. Ex. 416; 2 H. & N. 487.)

Before the Mercantile Law Amendment Act, 1856, it was not unusual when the sufficiency of the consideration on the face of the guarantee was doubtful, to set out the document in the declaration *verbatim*, in order to challenge a demurrer, and leave the question of construction to the court; but at present this course is unnecessary and inexpedient, unless some other reason exist for adopting it.

By s. 25 of the C. L. P. Act, 1852, cited *ante*, p. 48, a claim on a guarantee, whether under the seal or not, where the claim against the principal is in respect of a debt or liquidated demand, may be specially indorsed upon the writ of summons. This, however, does not alter the legal nature of the claim, or obviate the necessity of declaring in a special count, when a declaration becomes necessary.

By the Mercantile Law Amendment Act, 1856, s. 4, "no promise to answer for the debt, default, or miscarriage of another made to a firm consisting of

tween them], at prices amounting to £——, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not nor has the defendant paid the said £—— [*or*, yet the said *G. H.* has not paid the said £——, or any part thereof, nor has the defendant paid the same to the extent of £——], and the same remains due and unpaid to the plaintiff.

A like count: Christie v. *Borelly*, 29 L. J. C. P. 153; 7 C. B. N. S. 561.

A like count setting out the guarantee verbatim: Morrison v. *Trenchard*, 4 M. & G. 709; *Westhead* v. *Sproson*, 30 L. J. Ex. 265; 6 H. & N. 728.

On a continuing guarantee for the price of the goods to be supplied: Hitchcock v. *Humfrey*, 5 M. & G. 559.

On a continuing guarantee limited to a certain amount: Johnston v. *Nicholls*, 1 C. B. 251.

On the guarantee of a del credere agent for the price of the goods sold, ante, p. 52: Coutourier v. *Hastie*, 8 Ex. 40; 9 Ex. 102; *Tanvaco* v. *Lucas*, 28 L. J. Q. B. 150, 301; 1 E. & E. 581.

On a Guarantee of the due Payment of a Bill taken for the Price of Goods supplied to a third Party.

That in consideration that the plaintiff would sell and deliver goods to *G. H.* at certain prices amounting to £——, and would take from the said *G. H.* for and on account of the said goods his acceptance of a bill of exchange to be drawn by the plaintiff upon the said *G. H.* for the said price, payable six months after date to the plaintiff's order, the defendant guaranteed and promised the plaintiff that the said bill should be duly paid at maturity; and the plaintiff accordingly sold and delivered to the said *G. H.* the said goods at the said prices, amounting to £——, and took from the said *G. H.* his acceptance of such bill as aforesaid for and on account of the said goods, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said bill was not paid at maturity, whereby the plaintiff lost the price of the said goods.

Like counts: Mayer v. *Isaac*, 6 M. & W. 605; *Broom* v. *Batchelor*, 25 L. J. Ex. 299; 1 H. & N. 255.

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two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

As to actions on representations respecting the credit of third persons, see 9 Geo. IV. c. 14, s. 6; see *post*, "*Fraud*," ch. 3. *Pasley* v. *Freeman*, 2 Smith's L. C. 5th ed. 68.

On the Guarantee of the Debt of a third Person in consideration of Forbearance by the Plaintiff.

That *G. H.* was indebted to the plaintiff in £——; and in consideration that the plaintiff would forbear and give time to the said *G. H.* for payment thereof until the —— day of ——, A.D. ——, the defendant guaranteed and promised the plaintiff to be answerable to him for the payment by the said *G. H.* of the said £—— on the last-mentioned day; and the plaintiff did accordingly forbear and give time to the said *G. H.* for the payment of the said £—— until the last-mentioned day; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not, nor has the defendant, paid to the plaintiff the said £——, and the same remains due and unpaid.

Like counts: Rolt v. *Cozens*, 25 L. J. C. P. 254; 18 C. B. 673; *Smith* v. *Algar*, 1 B. & Ad. 603; *Payne* v. *Wilson*, 7 B. & C. 423.

A like count by an executor on a guarantee given by the testator: Tanner v. *Moore*, 9 Q. B. 1.

Count on a guarantee for a debt of another in consideration of the plaintiff giving up a lien on goods in respect of the debt: Clancy v. *Piggott*, 2 A. & E. 473.

On a bond of guarantee for a mortgage debt and interest and the premiums on a policy given as security: Wodehouse v. *Farebrother*, 25 L. J. Q. B. 18; 5 E. & B. 277.

Counts on promises to be answerable for a debt in consideration of the plaintiff discharging the debtor from custody: Goodman v. *Chase*, 1 B. & Ald. 297; *Brown* v. *Dean*, 5 B. & Ad. 848; *Smith* v. *Monteith*, 13 M. & W. 427; *Butcher* v. *Steuart*, 1 D. & L. 308; *Lewis* v. *Davison*, 4 M. & W. 654.

Upon a Guarantee to Bankers for Advances made on the Account of a third Person.

That the plaintiffs carried on the business of bankers in copartnership, and in consideration that the plaintiffs would open an account with *G. H.* at their bank, and would honour his checks, or otherwise advance and pay money to or for him on his said account, the defendant promised the plaintiffs to be responsible to them for any balance or sum of money which might at any time thereafter be due from the said *G. H.* to the plaintiffs upon his said account or otherwise; and the plaintiffs accordingly opened an account with the said *G. H.* at their said bank, and honoured his checks, and otherwise advanced and paid money to and for him on his said account and otherwise, and a balance or sum of £—— afterwards became due from the said *G. H.* to the plaintiffs upon his said account and otherwise; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not nor has the defendant paid the plaintiffs the said £——, and the same remains due and unpaid.

A like count: Howell v. *Jones*, 1 C. M. & R. 97.

On a covenant containing a like guarantee restricted to a certain sum: Davidson v. *M'Gregor*, 8 M. & W. 755.

On a like guarantee to secure past as well as future advances: Chapman v. *Sutton*, 2 C. B. 634; *Boyd* v. *Moyle*, 2 C. B. 644; *and see Bell* v. *Welsh*, 9 C. B. 610.

On a bond of guarantee given to bankers: Batson v. *Spearman*, 9 A. & E. 298; *Gordon* v. *Rae*, 27 L. J. Q. B. 185; 8 E. & B. 1065.

On a Guarantee to a Landlord for the Rent of Premises let to a third Party.

That in consideration that the plaintiff would let to *G. H.* a messuage and premises, from the —— day of ——, A.D. ——, at the yearly rent of £—— to be paid quarterly, namely, £—— every three months, commencing on the —— day of ——, A.D. ——, the defendant guaranteed and promised the plaintiff that he, the defendant, would be answerable to the plaintiff for the payment of the said rent by the said *G. H.*, and that if the said *G. H.* should not pay the said rent to the plaintiff the defendant would pay the same; and the plaintiff accordingly let the said messuage and premises to the said *G. H.*, and he entered into and became tenant to the plaintiff of the same on the terms aforesaid; and £—— of the said rent for —— quarters of a year of the said tenancy became due and payable to the plaintiff; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not nor has the defendant paid the plaintiff the said £——, and the same remains in arrear and unpaid.

Count on the same Guarantee, setting it out verbatim.

That an agreement in writing was made by and between the plaintiff and *G. H.* and the defendant, in the words and figures following, that is to say: "Memorandum of an agreement made this —— day of ——, ——, between *A. B.* of the one part, and *G. H.* of the other part, as follows: the said *A. B.* agrees to let, and the said *G. H.* agrees to take, all that messuage and premises situate at ——, and called No. 1, ——, together with all the furniture, fixtures, and all other things comprised in the inventory handed over, at the yearly rent of £——, to be paid quarterly, viz. £—— every three months, commencing on the —— day of ——, ——, clear of all rates and taxes, and *E. F.* does also agree and undertake to see the rent paid quarterly by the said *G. H.*, or otherwise does agree to pay the said rent quarterly for the said *G. H.*—*G. H.*, *E. F.*;" and the said person in the said agreement described as *A. B.* is the plaintiff, and the person therein described as *E. F.* is the defendant; and the plaintiff let the said messuage and premises, furniture, fixtures, and other things to the said *G. H.*, and he entered into and became tenant to the plaintiff of the same on the terms of the said agreement, and £—— of the said rent for —— quarters of a year of the said tenancy became due and payable to the plaintiff; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not nor has the defendant paid the plaintiff the said £——, and the same remains in arrear and unpaid.

A like count: Caballero v. *Slater*, 14 C. B. 300.

By a Landlord on a Guarantee to pay Rent due from a third Person in consideration of the Withdrawal of a Distress.

That the plaintiff had lawfully distrained goods of one *G. H.* for £——, arrears of rent due from the said *G. H.* to the plaintiff; and thereupon, in consideration that the plaintiff would withdraw the said distress and give up the said goods to the said *G. H.*, the defendant guaranteed and promised the plaintiff that he, the defendant, would be answerable to the plaintiff for the payment of the said arrears of rent and the costs of the said distress, which amounted to £——, on or before the —— day of ——, A.D. ——; and the plaintiff accordingly withdrew the said distress, and gave up the said goods to the said *G. H.*, and the last-mentioned day elapsed, and all conditions were fulfilled, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not nor has the defendant paid the plaintiff the said arrears of rent or the said costs, and the same still remain due and unpaid.

Count on a like guarantee in consideration of forbearing to distrain: Thomas v. *Williams*, 10 B. & C. 664.

On a Guarantee for Moneys received by an Agent.

That in consideration that the plaintiff would employ *G. H.* as his agent to receive and sell goods for the plaintiff, and to collect and pay over the proceeds of such sales to the plaintiff, the defendant guaranteed and promised the plaintiff that he the defendant would be answerable to the plaintiff to the extent of £——, for the due payment to him of all such moneys as the said *G. H.* should receive as such agent; and the plaintiff employed the said *G. H.* as such agent as aforesaid, for the purposes and on the terms aforesaid, and during such agency the said *G. H.* as such agent received on account of the plaintiff moneys amounting to £——, being the proceeds of such sales as aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the said *G. H.* has not paid the plaintiff the last-mentioned sum, nor has the defendant paid the same [*or* yet the said *G. H.* has not paid the plaintiff the last-mentioned sum or any part thereof, nor has the defendant paid the same to the extent of £——,] and the same still remains due and unpaid.

A like count: Stewart v. *M'Kean*, 10 Ex. 675.

A like count on a guarantee for a collecting clerk: Lyall v. *Higgins*, 4 Q. B. 528. *For a traveller and salesman: Norton* v. *Powell*, 4 M. & G. 42.

On a Covenant guaranteeing the due Accounting by a Clerk.

That by a deed bearing date the —— day of ——, A.D. ——, after reciting that *G. H.* had engaged himself as a clerk to the plaintiff in his business of a ——, as and from the —— day of ——, A.D. ——, upon the terms therein mentioned, the defendant covenanted with the plaintiff that in case the said *G. H.* should not duly and faithfully account to the plaintiff for all moneys and securities for money which he should receive as such clerk for or on account of the plaintiff, and duly pay over and deliver the same to the plaintiff

or his bankers for the time being, as and when the same should be so received by the said *G. H.*, he the defendant would pay to the plaintiff all such sum or sums of money and securities for money, or the amount thereof, as should not be accounted for and paid or delivered as aforesaid by the said *G. H.*, and would indemnify and save harmless the plaintiff from all loss, damages, and expenses which he should sustain or incur in respect thereof, provided always that the defendant's liability under the said covenant should not exceed in the whole £——; and the plaintiff says that afterwards and whilst the said *G. H.* continued in the said service of the plaintiff as such clerk as aforesaid, he received as such clerk, for and on account of the plaintiff, certain moneys and securities for money within the meaning of the defendant's said covenant, amounting to a sum exceeding £——, and did not duly and faithfully account for the same to the plaintiff, nor pay over or deliver to the bankers of the plaintiff for the time being the said moneys and securities for money or any of them, as and when the same were so received by him as aforesaid, and the plaintiff sustained and incurred loss and damage exceeding £—— in respect thereof; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to a performance by the defendant of his said covenant, and to maintain this action for the breach thereof hereinafter alleged; yet the defendant has not to the extent of £——, or any part thereof, paid to the plaintiff the last-mentioned moneys or securities for money, or the amount thereof, nor indemnified or saved harmless the plaintiff from the loss, damages, and expenses which he so sustained and incurred in respect thereof.

Count on a bond of guarantee given to a company for the conduct of an agent in the business of the company: London Assurance Co. v. *Bold*, 6 Q. B. 514; *Groux's Improved Soap Co.* v. *Cooper*, 8 C. B. N. S. 800.

Count on a bond of guarantee for a partner in the superintendence of the partnership business: Chapman v. *Beckington*, 3 Q. B. 703. *For the treasurer of a borough: Cambridge* v. *Dennis*, 27 L. J. Q. B. 474. *For a clerk to a railway company: Eastern Union Railway Company* v. *Cochrane*, 9 Ex. 197. *For the treasurer of a poor-law union: Belford Union* v. *Pattison*, 11 Ex. 623; 25 L. J. Ex. 91. *For an assistant-overseer, under* 59 *Geo. III. c.* 12; *Holland* v. *Lea*, 9 Ex. 430. *For a collector of poor-rates: Portsea Union* v. *Whillier*, 29 L. J. Q. B. 150.

Count on a guarantee for the erection of building works by a third party within a certain time: Watts v. *Shuttleworth*, 29 L. J. Ex. 229; 5 H. & N. 235.

Count on a guarantee for the due performance of a contract to build a ship: General Steam Navigation Co. v. *Rolt*, 6 C. B. N. S. 550.

Count on a guarantee given by a guarantee company against bad

debts, commercial losses, etc.: Bamberger v. *Commercial Credit Assurance Society*, 15 C. B. 676.

On a like guarantee for a term, to be renewed unless notice given to the contrary: Solvency Mutual Guarantee Society v. *York*, 27 L. J. Ex. 487; 3 H. & N. 588; *Solvency Mutual Guarantee Society* v. *Froane*, 7 H. & N. 5.

By a Co-debtor against the Creditor for not assigning to the Plaintiff a Judgment against him and his Co-debtors after payment of the Debt by the Plaintiff (under the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5.) (a.)

That the plaintiff was liable jointly with *G. H.* to the defendant for a debt of £——, and the defendant on the —— day of ——, A.D. ——, in the court of —— at Westminster, by the judgment of the said court recovered against the plaintiff and the said *G. H.*, in respect of the said debt, £—— together with £—— for his costs of suit; and the defendant afterwards issued execution against the plaintiff and the said *G. H.* on the said judgment for £——, and the plaintiff was obliged to pay, and paid, the said £—— for which the said judgment had been so recovered as aforesaid; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said judgment assigned to him by the defendant, in order to obtain from the said *G. H.* the proportion of the said debt for which the said *G. H.* was justly liable as between him and the plaintiff; yet the defendant did not nor would assign the said judgment to the plaintiff.

A like count: Batchellor v. *Lawrence*, 30 L. J. C. P. 39; 9 C. B. N. S. 543.

(a) By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97 s. 5, "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

The court has no summary jurisdiction to enforce the assignment of securities under this section, but an action will lie for refusing to make an assignment to which a person is entitled under it. (*Phillips* v. *Dickson*, 29 L. J. C. P. 223; 8 C. B. N. S. 391; and see *Batchellor* v. *Lawrence*, 30 L. J. C. P. 39.)

Heirs and Devisees (*a*).

Against the Heir and Devisee jointly on a Covenant of the Testator. (1 *Will. IV. c.* 47, *ss.* 3, 4.)

[*Commence with one of the forms, ante, pp.* 16, 17.] That the said *G. H.* in his lifetime, by deed covenanted for himself and his heirs, with the plaintiff, that the said *G. H.* would pay to the plaintiff £——, with interest for the same, at the rate of £—— per centum per annum, on the —— day of ——, A.D. ——, now elapsed; and the said £—— and interest are still unpaid.

Against an Heir on the Bond of his Ancestor.

(*Commence with the form, ante, p.* 16.) That the said *G. H.*, in his lifetime, by his bond bearing date the —— day of ——, A.D. ——, for himself and his heirs, became bound to the plaintiff in the sum of £——.

A like count against the heir and surviving devisees: Farley v. *Briant*, 3 A. & E. 839.

A like count against devisees only, there being no heir: Hunting v. *Sheldrake*, 9 M. & W. 256.

Counts by and against the heir and devisee of a lessor on covenants running with the land: see *post*, "*Landlord and Tenant*," p. 180, 184.

Hire.

Indebitatus Count for the Hire of Goods. (*C. L. P. Act*, 1852, *Sched. B.* 12.)

Money payable by the defendant to the plaintiff for the hire of goods, by the plaintiff let to hire to the defendant.

(*a*) *Heirs and Devisees.*]—At common law an important distinction was made between specialty debts in which the obligor bound himself only, and those in which he also bound his heir by name. The former did not charge the lands of the ancestor which passed by descent to the heir; the latter did, and the obligee could recover upon them against the heir, to the extent of the lands which the latter acquired by descent from the obligor. In neither case could the obligee recover against a devisee of the lands.

The statute 1 Will. IV. c. 47 (which repealed the 3 W. & M. c. 14) now gives a like remedy against the devisee upon specialty debts of the latter kind to the extent of the lands devised. There is still, however, no remedy at law against the heir or devisee upon specialty debts of the former kind, in which the obligor has bound himself only and not his heirs. But these debts (equally with simple contract debts) are now charged in equity upon the land of the obligor after his decease, by the statute 3 & 4 Will. IV. c. 104, where he has not charged them by his will; a priority only being reserved to the specialties in which the heir is expressly bound.

The action at law against the heir and devisee of a testator, upon specialties in which the heir is bound, is founded on the 1 Will. IV. c. 47. By 2 testamentary dispositions of real estate whereof the testator was

Against the Hirer of Goods for Damage occasioned by negligent Use.

That in consideration that the plaintiff would let to hire to the defendant certain household furniture and goods (*a*), to be used by the defendant, for reward to the plaintiff, the defendant promised the plaintiff to use the said furniture and goods in a careful and reasonable manner, whilst he should have the same on hire as aforesaid; and the plaintiff let to hire and delivered to the defendant, and the defendant hired and received from the plaintiff, the said furniture and goods for the purpose and on the terms aforesaid; yet the defendant did not use the said furniture and goods in a careful and reasonable manner whilst he had the same on hire as aforesaid; whereby the said furniture and goods were damaged and diminished in value.

Against the tenant of a house for not using it in a tenantlike manner: post, "*Landlord and Tenant,*" p. 172.

Count against the hirer of a steam-vessel for using it to wage war against a foreign state, whereby the vessel was seized and detained: Bleaden v. *Rapallo,* 3 M. & G. 116; *and see Blewitt* v. *Hill,* 13 East, 13.

Husband and Wife (*b*).

Indebitatus Count by Husband and Wife upon Causes of Action accrued to the Wife before Marriage.

(*Commence with the form, ante, p.* 17.) Money payable by the defendant to the plaintiffs for goods sold and delivered by the said

seised in fee, in possession, reversion, or remainder, are to be deemed void as against any person with whom the testator had entered into any bond, covenant, or other specialty binding his heirs. By s. 3, every such creditor shall have an action upon such specialties against the heir and devisee, or the devisee of such devisee jointly. By s. 4, in case there shall not be any heir, the creditor may maintain an action against the devisee or devisees solely. As to these actions see further, 2 Wms. Saund. 7, 8; *Morley* v. *Morley,* 25 L. J. C. 4, 332; 5 De G. M. & G. 610; and the cases above cited. And see *post, Pleas,* "*Heirs and Devisees,*" ch. 5.

(*a*) If the letting of a house forms part of the consideration for the promise, it must be stated.

(*b*) *Husband and wife.*]—In actions brought on promises made *to* the wife before marriage, the husband and wife ought to sue jointly. If the wife sues alone, the action may be met by a plea in abatement; but no other objection can be taken by the defendant (*Milner* v. *Milnes,* 3 T. R. 627, 631; and see *Bendix* v. *Wakeman,* 12 M. & W. 97.) If the husband sues alone, and the objection appears upon the record, it may be met by demurrer, or by motion in arrest of judgment, or by error; or if it transpires upon the evidence, it will be ground of nonsuit, or adverse verdict. But on a negotiable bill of exchange or promissory note, made payable to the wife before the marriage, the husband may sue alone in his own name. (*McNeilage* v. *Holloway,* 1 B. & Ald. 218.) If the husband dies before action, the right of action remains in the widow; if the wife dies before action, the right of action passes to her administrator, and the husband cannot sue except in that character.

In actions brought on promises made *by* the wife before marriage, the husband and wife ought to be sued jointly. (*France* v. *White,* 1 M. &

C. (*Christian name of the wife*) whilst she was unmarried to the defendant, and for goods then bargained and sold by the said *C.* to the defendant, and for work then done and materials then provided by the said *C.* for the defendant at his request, and for money

G. 731.) If the wife is sued alone, she may plead her coverture in abatement, but cannot take the objection in any other manner. (*Lovell* v. *Walker*, 9 M. & W. 299; *Milner* v. *Milnes*, 3 T. R. 627, 631.) If the husband is sued alone, and the objection appears on the record, it may be met by demurrer, or by motion in arrest of judgment, or by error; or if it transpires upon the evidence, it will be ground of nonsuit or adverse verdict. (*Mitchinson* v. *Hewson*, 7 T. R. 348; *Richardson* v. *Hall*, 1 B. & B. 50.) And the mistake cannot be amended by adding the wife as a defendant under the C. L. P. Act, 1852, s. 222. (*Garrard* v. *Giubilei*, 31 L. J. C. P. 131.) If the husband dies before action, the right of action remains against the widow; if the wife dies before action, the right of action lies only against her administrator.

Where a promise is made *to* a married woman on a consideration proceeding from her solely, as a contract with her to pay for her services rendered; wherever, as it is said, the wife is the meritorious cause of action, the husband may, at his election, sue alone in his own name, or jointly in the name of himself and wife (*Bidgood* v. *Way*, 2 W. Bl. 1236; *Dalton* v. *Midland Ry. Co.*, 13 C. B. 474); or the wife may sue alone, subject only to the non-joinder of the husband being pleaded in abatement. (Ib.) If she fails in shewing a promise to her on a consideration proceeding from her solely, she will be nonsuited. Thus, on a bond given to the wife during coverture, husband and wife may have a joint action during their lives; or the husband may sue during coverture in his own name. (*Day* v. *Padrone*, 2 M. & S. 396 n. (*b*); *Ankerstein* v. *Clarke*, 4 T. R. 616.) On a note made *to* a wife during coverture, the husband may sue alone, or husband and wife may sue jointly. (*Philliskirk* v. *Pluckwell*, 2 M. & S. 393; *Howard* v. *Oakes*, 3 Ex. 136; *Burrough* v. *Moss*, 10 B. & C. 558.) A wife may sue alone for dividends due on railway stock registered in her name, subject only to a plea in abatement. (*Dalton* v. *Midland Ry. Co.*, 13 C. B. 474.) A count by husband and wife jointly upon such contracts as these made since the marriage, must state the interest of the wife or the consideration as proceeding from the wife, otherwise the count will be bad: thus, a count upon accounts stated with them must show that the accounting was in respect of debts for which she had a right to sue. (*Bidgood* v. *Way*, 2 W. Bl. 1236; *Johnson* v. *Lucas*, 1 E. & B. 659.) The right of action on a bond or note made *to* a wife, or on any contract on which she has a right to sue, remains in the wife on the death of her husband before suit, and does not pass to the husband's representative. (*Howard* v. *Oakes*, 3 Ex. 136; *Gaters* v. *Madeley*, 6 M. & W. 423; *Richards* v. *Richards*, 2 B. & Ad. 447; and if the wife dies before suit, the right of action passes to her administrator (*Day* v. *Padrone*, 2 M. & S. 396; *Hart* v. *Stephens*, 6 Q. B. 937); and the husband cannot sue except in that capacity.

In actions brought to charge a husband on contracts made *by* his wife during coverture, the husband must be sued alone, and the pleadings take the ordinary form; the husband and wife cannot be sued jointly on such contracts. (*France* v. *White*, 1 M. & G. 731.) The wife can contract only as agent for the husband; and the liability of the husband depends upon the authority of the wife to pledge his credit, which must be proved by the plaintiff.

The authority of the wife during cohabitation is in all cases a question of fact for the jury; but there is a *primâ facie* presumption in favour of the authority in respect of contracts such as a wife in her position in life usually makes; which, however, may be rebutted by the husband showing that in fact it did not exist. (*Montague* v. *Benedict*, 2 Smith's L. C. 5th ed. 408; *Seaton* v. *Benedict*, *ib.* 414; *Lane* v. *Ironmonger*, 13 M. & W. 368; *Reid*

then lent by the said *C.* to the defendant, and for money then paid by the said *C.* for the defendant at his request, and for money then received by the defendant for the use of the said *C.*, and for money

v. *Teakle*, 13 C. B. 627; *Reneaux* v. *Teakle*, 8 Ex. 680; *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.)

There is no such presumption of authority during separation, but a married woman living apart from her husband with his consent, or compelled to separate herself from him by his misconduct, and without an adequate maintenance, has an implied authority, which he cannot rebut, to bind her husband by contracts for necessaries (*Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200; *Bolton* v. *Prentice*, 2 Strange, 1214; S. C. Selwyn's N. P. 12th ed. p. 334; *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Mizen* v. *Pick*, 3 M. & W. 481; *Johnson* v. *Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341; *Biffin* v. *Bignell*, 31 L. J. Ex. 189); unless she has been guilty of adultery (*Govier* v. *Hancock*, 6 T. R. 603; *Atkyns* v. *Pearce*, 26 L. J. C. P. 252; 2 C. B. N. S. 763; *Cooper* v. *Lloyd*, 6 C. B. N. S. 519). A husband is not liable at law for money paid for the use of his wife, though spent in necessaries for her (*Knox* v. *Bushell*, 3 C. B. N. S. 334), but he is in equity (*Jenner* v. *Morris*, 30 L. J. C. 361).

At law a wife cannot make any contract to bind herself personally. If sued alone upon a contract made during the marriage, she may plead her coverture either in abatement, or in bar, *post*, ch. 5. In equity a married woman may contract in respect of her separate estate even with her husband. (*Vansittart* v. *Vansittart*, 27 L. J. C. 222; 2 De G. & J. 249; *Vaughan* v. *Vanderstegen*, 23 L. J. Ch. 793; 800; *Wright* v. *Chard*, 29 L. J. C. 82, 90; *Johnson* v. *Gallagher*, 30 L. J. C. 298.)

On a bond or covenant or promissory note made *to husband and wife*, the husband may sue alone (*Ankerstein* v. *Clarke*, 4 T. R. 616,) or may join the wife. (*Philliskirk* v. *Pluckwell*, 2 M & S. 393.) If the husband dies before suit, the right of action survives to the wife, and does not pass to the husband's representative. If he survives, it belongs to him.

Where a husband becomes bankrupt, his assignees must join the wife in suing on causes of action accrued in right of the wife, which if vested in the husband would pass to the assignees. (*Richbell* v. *Alexander*, 30 L. J. C. P. 268; 10 C. B. N. S. 324.) The assignees of a bankrupt husband cannot sue alone in their own names on a bill or note made payable to the wife. (*Sherrington* v. *Yates*, 12 M. & W. 855.)

As to the position of a married woman as an executrix, see *ante*, "Executors," p. 132.

As to the effect of the marriage of a woman, plaintiff or defendant, pending an action, see C. L. P. Act, 1852, s. 141; *post*, c. 5, "Abatement."

Under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may obtain an order of a magistrate or of the court protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*; and the wife shall, during the continuance of such order of protection, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

By s. 25, "in every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole*, with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife

found to be due from the defendant to the said *C.* whilst she was unmarried upon accounts then stated between them, and for money payable by the defendant to the plaintiffs for money found to be due from the defendant to the plaintiffs on accounts stated between the defendant and the plaintiffs, since their intermarriage, in respect of moneys payable by the defendant to the said *C.* whilst she was unmarried.

Count by husband and wife upon accounts stated with them since the marriage in respect of debts due to the wife before marriage: Johnson v. *Lucas*, 1 E. & B. 659.

On a covenant made to a husband and wife for the payment of rent: Hill v. *Saunders*, 4 B. & C. 529.

Count by husband and wife upon a contract made with them after marriage, in consideration of forbearance to proceed upon a cognovit given in an action brought by husband and wife: Nurse v. *Wills*, 4 B. &. Ad. 739; S. C. *in error*, 1 A. & E. 65; *Hopkins* v. *Logan*, 5 M. & W. 241.

Indebitatus Count against Husband and Wife upon Causes of Action accrued before Marriage.

(*Commence with the form, ante*, p. 17.) Money payable by the defendants to the plaintiff for goods sold and delivered by the plaintiff to the said *C.* whilst she was unmarried, and for goods then bargained and sold by the plaintiff to the said *C.*, and for work then done and materials then provided by the plaintiff for the said *C.* at her request, and for money then lent by the plaintiff to the said *C.*, and for money then paid by the plaintiff for the said *C.* at her request, and for money then received by the said *C.* for the use of the plaintiff, and for money found to be due from the said *C.*, whilst she was unmarried, to the plaintiff on accounts then stated between them.

Count on a covenant in a deed of separation that the wife shall not molest or disturb the husband: Thomas v. *Everard*, 30 L. J. Ex. 214. *To indemnify the husband against the wife's debts: Summers* v. *Ball*, 8 M. & W. 596.

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should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

By s. 26, "in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use."

An order of protection obtained by a married woman deserted by her husband, under s. 21, though it protects her property acquired since the commencement of the desertion, does not entitle her to maintain an action commenced before the date of the order. (*Midland Ry. Co.* v. *Pye*, 30 L. J. C. P. 314; 10 C. B. N. S. 179.)

A woman after divorce is solely entitled to such of her property as was

Counts by and against husband and wife executrix, ante, "*Executors and Administrators,*" p. 132.

Counts by and against husband and wife on bills and notes, ante, "*Bills of Exchange,*" pp. 85, 94.

Actions relating to marriage, see post, "*Marriage,*" p. 190.

Indemnities (*a*).

By the Acceptor of an Accommodation Bill on the Contract to indemnify him.

That in consideration that the plaintiff would accept for the defendant's accommodation a bill of exchange, drawn by the defendant on the plaintiff, requiring him to pay to the defendant, or order £——, —— months after date, and would deliver the same to the defendant, in order that he might negotiate the same for his own use, the defendant promised the plaintiff to indemnify and save harmless the plaintiff from any loss or damage by reason thereof; and the plaintiff accepted the said bill for the defendant's accommodation, and delivered the same to him for the purpose and on the terms aforesaid; yet the defendant did not indemnify or save harmless the plaintiff from loss or damage by reason thereof, and the plaintiff, as acceptor of the said bill, was obliged to pay to *G. H.*, the holder thereof, the amount of the said bill with interest thereon, and the costs of an action brought by the said *G. H.* against the plaintiff as such acceptor, and the plaintiff also incurred costs in defending and settling the said action.

A like count: Hardcastle v. *Netherwood,* 5 B. & Ald. 93; *Reynolds* v. *Doyle,* 1 M. & G. 753; *Crampton* v. *Walker,* 30 L. J. Q. B. 19.

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not reduced into possession by her husband during the coverture. (*Wells* v. *Malbon,* 31 L. J. C. 344.

(*a*) Where the plaintiff has paid money, against the payment of which the defendant had undertaken to indemnify him, the money so paid may be recovered under the common indebitatus count for money paid; (see *ante,* p. 36); but it may sometimes be necessary to sue in a special count, in order to recover unliquidated damages for the breach of a contract of indemnity. Where the claim under the contract of indemnity is both for money paid and for unliquidated damages, as a special count by an accommodation acceptor for the amount of the bill which he has been compelled to pay, and also for costs and expenses incurred, the defendant may plead a set-off to so much of the count as relates to the money paid, though he cannot plead such a plea to the residue, or to the whole declaration. (*Hardcastle* v. *Netherwood,* 5 B. & Ald. 93; *Crampton* v. *Walker,* 30 L. J. Q. B. 19.)

The drawer or acceptor of an accommodation bill is entitled to recover against the party accommodated, not only the amount of the bill but also the costs which he has been compelled to pay. (*Jones* v. *Brooke,* 4 Taunt. 464; *Stratton* v. *Mathews,* 3 Ex. 48.) And where the costs have been incurred at the defendant's request, and actually paid before the action, they may be recovered under the count for money paid. (*Garrard* v. *Cottrell,* 10 Q. B. 679; and see *Crampton* v. *Walker,* 30 L. J. Q. B. 19.)

Upon a contract to indemnify an accommodation acceptor the cause of action accrues when the plaintiff is damnified by payment, and the statute of limitations begins to run from that date (*Reynolds* v. *Doyle,* 1 M. & G. 753); so on a contract to indemnify against the costs of maintaining an action. (*Collinge* v. *Heywood,* 9 A. & E. 633.)

A like count by the accommodation drawer of a bill: Batson v. *King*, 28 L. J. Ex. 327.

Common count for money paid for the same cause of action: Garrard v. *Cottrell*, 10 Q. B. 679.

Count by one joint maker of a bill against the other on a covenant to pay the bill: Loosemore v. *Radford*, 9 M. & W. 657.

Count on an indemnity bond given by a principal debtor to his sureties: Field v. *Robins*, 8 A. & E. 90.

On indemnities against debts undertaken by defendant: Carr v. *Roberts*, 5 B. & Ad. 78; *White* v. *Ansdell*, 1 M. & W. 348.

Count on a deed of indemnity against liabilities incurred as trustee: Gillett v. *Abbott*, 7 A. & E. 783.

On an Indemnity to the Plaintiff against taking up a Bill and bringing an Action upon it.

That in consideration that the plaintiff would pay the amount of a bill of exchange indorsed by the defendant to the holder thereof, and take up the same, and bring an action in the name of the now plaintiff against *G. H.*, the acceptor of the said bill, for the amount due thereon, the defendant promised the plaintiff to indemnify and save harmless the plaintiff from all loss and costs which he might incur by reason of such payment and of such action as aforesaid; and the plaintiff accordingly paid the amount of the said bill to the said holder thereof, and took up the same, and brought such action as aforesaid in his own name against the said *G. H.* for the amount due thereon, and such proceedings were had in the said action that the said *G. H.* obtained a verdict therein against the plaintiff, whereby the plaintiff became liable to pay his own costs and the costs of the said *G. H.* in the said action, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not indemnify and save harmless the plaintiff from the loss incurred by him by reason of the said payment or from the said costs.

A like count: *Spark* v. *Heslop*, 1 E. & E. 563.

On an indemnity against prosecuting an action of replevin: Collinge v. *Heywood*, 9 A. & E. 633.

On a bond of indemnity, given to the plaintiff in an action, against costs: Hankin v. *Bennett*, 8 Ex. 107.

On a bond to indemnify against actions: Attwooll v. *Attwooll*, 2 E. & B. 23.

On a Promise to Indemnify the Plaintiff against Defending an Action.

That *G. H.* had brought an action against the plaintiff to recover a sum of money in the hands of the plaintiff, which was claimed by the defendant; and thereupon in consideration that the plaintiff would defend the said action, the defendant promised the plaintiff to save him harmless from all loss and damage by reason of his de-

fending the same; and the plaintiff accordingly defended the said action, and such proceedings were had therein that the said *G. H.* recovered judgment therein against the plaintiff for £—— and costs of suit, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not save the plaintiff harmless from all loss and damage by reason of his defending the said action, and the plaintiff, being unable to pay the said £—— and costs, was taken in execution on a writ of *capias ad satisfaciendum* sued out by the said *G. H.* on the said judgment, and was imprisoned until he paid the said £—— and costs and the expenses of the said execution, and the plaintiff was then obliged to pay the same, and also incurred other costs and expenses in defending the said action.

Like counts: Williamson v. *Henley*, 6 Bing. 299; *Blyth* v. *Smith*, 5 M. & G. 405.

By a Broker against a Landlord upon an Indemnity against the Illegality of a Distress (*a*).

That in consideration that the plaintiff would, as the defendant's broker, distrain goods in a certain dwelling-house for rent alleged by the defendant to be in arrear and due to him for the said dwelling-house, the defendant promised the plaintiff to indemnify and save harmless the plaintiff from all loss and damage which he might sustain by reason of the defendant not having any right or title to distrain as aforesaid; and the plaintiff accordingly in a lawful and proper manner distrained the said goods in the said dwelling-house for the said rent, and afterwards by reason of the defendant not having any right or title to distrain as aforesaid, an action was brought by the owner of the said goods against the plaintiff for so distraining as aforesaid, and judgment therein was recovered against the now plaintiff, and he was obliged to pay the damages and costs of suit recovered by the said owner of the said goods, and also his own costs of defending the said action, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not indemnify and save harmless the plaintiff from the said loss and damage.

Like counts: Preston v. *Peeke*, 27 L. J. Q. B. 424; *Toplis* v. *Grane*, 5 Bing. N. C. 636; *Cox* v. *Bailey*, 6 M. & G. 193; *Ibbett* v. *De la Salle*, 30 L. J. Ex. 44; 6 H. & N. 233.

By an Auctioneer against his Employer on the implied Indemnity against defect of title to the goods sold: Adamson v. *Jarvis*, 4 Bing. 66.

(*a*) The usual indemnity impliedly given to a broker extends only to acts properly done by him in pursuance of his authority; but an express indemnity will depend upon its terms, and may even cover the costs of an action brought against the broker without cause for alleged irregularities in the distress. (*Ibbett* v. *De la Salle*, 30 L. J. Ex. 44; 6 H. & N. 233.)

By a Broker against his Employer upon an Indemnity against the Liability of the Broker for the Price of Stock, etc., purchased on the Stock Exchange. *See ante*, p. 100.

That the plaintiff was a licensed stock and share broker and member of the Stock Exchange in the city of London, and by the regulations of the said Exchange it was, amongst other things, provided that, on a purchase of stock or shares on the said Exchange by a broker, in the event of such stock or shares not being paid for at the time fixed for the payment by the contract of purchase, the purchaser's broker should be liable to indemnify the seller in respect of such default; and thereupon in consideration that the plaintiff, as and being such broker as aforesaid, would purchase for the defendant certain stock and shares on the said Exchange, subject to the said regulations, the defendant retained the plaintiff, as and being such broker as aforesaid, to purchase for the plaintiff the said stock and shares as aforesaid, and promised the plaintiff to indemnify and save harmless the plaintiff in respect of such liability as aforesaid; and the plaintiff accordingly purchased the said stock and shares for the defendant on the said Exchange subject to the said regulations, and the defendant made default in the payment for the said stock and shares at the time fixed for payment by the contract of purchase, whereby the plaintiff became liable to pay and paid to the seller the price of the said stock and shares, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not indemnify the plaintiff or save him harmless in respect of the liability aforesaid.

A like count: Smith v. *Lindo*, 27 L. J. C. P. 196; 4 C. B. N. S. 395.

By Vendor against Purchaser of Shares in a Mine, upon an implied Indemnity against future Calls (a).

That the plaintiff was possessed of —— shares in a mining company called ——, and was the registered owner thereof, subject to the regulations of the said company, and according to the said regulations the person registered as the owner of shares therein continued liable to calls made in respect of the said shares while he continued registered as such owner; and thereupon in consideration that the plaintiff would sell to the defendant the said shares of the plaintiff, and would deliver to the defendant a transfer thereof signed by the plaintiff, the defendant promised the plaintiff that he the defendant would accept the said shares, and pay for the same, and cause them to be registered in the defendant's name as owner thereof, according to the regulations of the said company, within a reasonable time in that behalf, so that the plaintiff might be relieved from further liability in respect of the said shares; and all condi-

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(*a*) As to the indemnities implied between transferee and transferror of shares in a joint stock company, see 19 & 20 Vict. c. 47, s. 66.

(*b*) The payment of rent by the plaintiff to the defendant is not a condition precedent to the indemnity, and therefore a plea that more rent was due from the plaintiff to the defendant than the amount distrained for was held a bad plea. (*Briant* v. *Pilcher*, 16 C. B. 354.)

tions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not cause the said shares to be registered in his name as owner thereof, according to the regulations of the said company, and left the same registered in the plaintiff's name, whereby the plaintiff became liable, and was compelled to pay calls subsequently made on the said shares.

A like count: Walker v. *Bartlett*, 17 C. B. 446; *and see Cheale* v. *Kenward*, 27 L. J. C. 784.

By an Undertenant against his immediate Landlord for not indemnifying him against the Non-payment of Rent and a Distress by the superior Landlord (b).

That the defendant was tenant to *G. H.* of premises at a certain yearly rent; and in consideration that the plaintiff would become tenant to the defendant of the said premises at a certain yearly rent, the defendant promised the plaintiff to indemnify and save harmless the plaintiff, during the continuance of the said tenancy of the plaintiff, against the payment of the said rent so payable by the defendant as aforesaid, and against any distress or costs that might be made or incurred by reason of the non-payment thereof; and the plaintiff became tenant to the defendant of the said premises upon the terms aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged; yet the defendant did not, during the continuance of the said tenancy of the plaintiff, indemnify or save harmless the plaintiff as aforesaid, whereby during the continuance of the said tenancies respectively a distress was lawfully made by the said *G. H.* on the goods of the plaintiff, on the said premises, for the said rent so payable by the defendant as aforesaid, and then in arrear, and the said goods of the plaintiff were sold to satisfy the last-mentioned rent, and the costs of the said distress.

Like counts: Hancock v. *Caffyn*, 8 Bing. 358; *Ridley* v. *Plymouth Baking Co.*, 2 Ex. 711; *Briant* v. *Pilcher*, 16 C. B. 354.

Count by tenant against undertenant on a promise to pay the rent to the superior landlord, and to indemnify the plaintiff therefrom: Smith v. *Lovell*, 10 C. B. 6.

Against a previous occupier on an agreement made upon a transfer of the tenancy to indemnify the plaintiff, the present occupier, against the rent then due: Hodgson v. *Johnson*, 28 L. J. Q. B. 88.

By assignor against assignee of a lease upon contracts of indemnity against covenants in the lease: Groom v. *Bluck*, 2 M. & G. 567; *Neale* v. *Wyllie*, 3 B. & C. 533; *Walker* v. *Hatton*, 10 M. & W. 249; *Smith* v. *Peat*, 9 Ex. 161; *see a form framed in case, Burnett* v. *Lynch*, 5 B. & C. 589.

Counts on indemnities against incumbrances in contracts of sale, mortgages, etc.: Nash v. *Palmer*, 5 M. & S. 374; *Saward* v. *Anstey*, 2 Bing. 519; *Allard* v. *Kimberley*, 12 M. & W. 410; *Fowle* v. *Welsh*, 1 B. & C. 29.

On a covenant of indemnity given by the directors of a company to a retiring director against liabilities in respect of his previous interest in the company: Haddon v. *Ayers*, El. & El. 118.

Other counts on indemnities: see counts for general average, post, "*Insurance,*" p. 157.

INFANTS. *See ante,* p. 18; *post,* c. 5, "*Infancy.*"

INJUNCTION. *See post,* c. 3, "*Injunction.*"

INSURANCE; I. MARINE POLICIES (*a*).

On a Policy of Insurance on a Ship for a total Loss.

That the plaintiff [by *G. H.* his agent], by a policy of insurance bearing date the —— day of ——, caused himself to be insured at

(*a*) The action on a policy of marine insurance may be brought in the name of the party nominally effecting the insurance, being the agent or insurance broker, or in the name of the principal or party interested.

By the statute 28 Geo. III. c. 56, s. 1, it is enacted, "that it shall not be lawful for any person to effect any policy of insurance upon any ship, goods, or other property, without first inserting in such policy the name or names, or usual style and firm of one or more of the persons interested in such insurance, or of the consignors or consignees of the property insured, or of the persons residing in Great Britain, who shall receive the order for and effect such policy, or of the persons who shall give the order to the agent immediately employed to effect such policy;" and by s. 2, every policy made contrary to the meaning of this Act shall be void.

As to the interest of parties insuring, it is enacted by the statute 19 Geo. II. c. 37, "that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty or any of his subjects, or any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer: and that every such assurance shall be null and void to all intents and purposes."

By the statute 35 Geo. III. c. 63, regulating the stamps on marine insurances, it is enacted (s. 2) "that every contract or agreement which shall be made or entered into for insurance, in respect whereof any duty is by this Act made payable, shall be engrossed, printed or written, and shall be deemed and called "A Policy of Insurance;" and that the premium, or consideration in the nature of a premium, paid, given, or contracted for upon such insurance, and the particular risk or adventure insured against,

and from the port of —— to the port of —— upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship ——, beginning the adventure at the said port

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together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy; and in default thereof every such insurance shall be null and void to all intents and purposes whatever."

By ss. 14, 16 of the same Act, a policy not properly stamped when it is made is void, and cannot be stamped afterwards. By s. 13, alterations may be made in the terms of the policy under certain restrictions.

Where a partnership subscribes a policy it is sufficient under this statute if the name of the firm is expressed in the policy (*Reid* v. *Allan*, 4 Ex. 326); and the individual partners are liable upon it though not individually named. (*Hallett* v. *Dowdall*, 18 Q. B. 2.)

In declarations on marine policies, the interest in the subject of the policy is averred as being in the plaintiff, if the insured, or in the person or persons on behalf of whom he is suing. (*Cohen* v. *Hannam*, 5 Taunt. 101.) By r. 9. T. T. 1853, "In actions on policies of assurance, the interest of the assured may be averred thus: 'That *A. B. C.* and *D.* [or some or one of them] were or was interested,' etc. And it may also be averred, 'that the insurance was made for the use and benefit and on the account of the person or persons so interested.'" An averment of interest at the time of or before effecting the policy is immaterial; it is sufficient if the plaintiff be interested at the commencement of the risk. (*Rhind* v. *Wilkinson*, 2 Taunt. 237.) If the insured assigns away his interest after effecting the policy and before the loss, he cannot recover upon the policy, except as trustee for the assignee where the policy has been assigned with the interest. (*Powles* v. *Innes*, 11 M. & W. 10.) In an action on a policy (lost or not lost) it is immaterial that the plaintiff acquired his interest after the loss. (*Sutherland* v. *Pratt*, 11 M. & W. 296.)

In declaring on marine policies, when the nature of the claim makes it necessary to refer to the whole contents of the policy, memoranda, etc., it will frequently be found convenient to set out the document verbatim, as the commercial form of these instruments, and the blanks left in them, make it sometimes difficult to recite them in a satisfactory manner; (see the form given p. 158.) In other cases the shortest form, of course, is to give the legal effect of the material parts of the contract as in other declarations. Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendant's liability, (*Dawson* v. *Wrench*, 3 Ex. 359,) and the declaration must negative that the defendant comes within the exceptions: (ib.; but see *Wheeler* v. *Bavidge*, 9 Ex. 668.) Under a declaration, charging a total loss of ship or freight, a partial loss may be recovered. (*Benson* v. *Chapman*, 8 C. B. 950, 965.) A count for money received should be added, if there is any claim for a return of the premium. (*Dalzell* v. *Mair*, 1 Camp. 532.)

By the 3 & 4 Will. IV. c. 42, s. 29, (cited *ante*, p. 43,) the jury may give damages in the nature of interest in actions on policies of assurance.

See further as to the pleadings in actions on marine policies, "*Arnould* on Marine Ins.," 2nd ed., 1246–1304; Marshall on Marine Ins., 4th ed., by Shee, c. xvi.

Under the 6 Geo. I., c. 18, two companies—the London Assurance and the Royal Exchange Assurance—were incorporated, for the purpose of granting marine insurances, and by s. 4 a general form of declaration was given against them for recovering double damages and costs of suit; and by the 11 Geo. I., c. 30, s. 43, they may plead in a general form, which is a privilege not taken away by the 5 & 6 Vict. c. 3, (see post, "General Issue by Statute;" and see *Carr* v. *Royal Exchange Assurance*, 31 L. J. Q. B. 93.)

of ——, and continuing during her abode there, and until the said ship and premises should be arrived at the said port of ——, and until she should have moored at anchor twenty-four hours in safety, against perils of the seas [etc. *according to the policy, stating those perils from which the loss arose*], the said ship and premises being warranted free from average under £3 per cent., unless general, or the ship should be stranded; and the defendant, for a certain premium paid to him by the plaintiff, subscribed the said policy for £——, and became an insurer thereon to the plaintiff for that amount on the said ship and premises; and the plaintiff was then and thence until and at the time of the loss hereinafter mentioned interested in the said ship and premises to the amount of all the moneys by him insured thereon; and the said ship, with the said other premises on board thereof, departed on her said voyage, and afterwards while she was proceeding on the said voyage, and during the continuance of the said risk, the said ship and premises were by perils so insured against as aforesaid wholly lost, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £—— by the defendant; yet the defendant has not paid the same.

Like counts: Baines v. *Holland*, 10 Ex. 802; *Redman* v. *Wilson*, 14 M. & W. 476; *Parfitt* v. *Thompson*, 13 M. & W. 392.

On a policy upon ship and cargo free from capture, etc.: Powell v. *Hyde*, 25 L. J. Q. B. 65; 5 E. & B. 607; *Kleinwort* v. *Shepard*, 28 L. J. Q. B. 147; E. & E. 447.

Count upon an indemnity clause in a policy against loss by reason of running down another ship: Thompson v. *Reynolds*, 26 L. J. Q. B. 93; 7 E. & B. 172.

On a Policy of Insurance upon Cargo for a total Loss.

That the plaintiff, by a policy of insurance bearing date the —— day of ——, A.D. ——, caused himself to be insured at and from —— to a port of discharge in the United Kingdom upon goods in the ship ——, beginning the adventure from the loading of the said goods on board the said ship as above, and continuing until they should be safely discharged and landed, against perils of the seas [etc. *according to the policy, stating those perils from which the loss arose*]; corn, fish, salt, fruit, flour, and seed being warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins being warranted free from average under £5 per cent., and all other goods being warranted free from average under £3 per cent., unless general, or the ship should be stranded; and the defendant, for a certain premium paid to him by the plaintiff, subscribed the said policy for £——, and became an insurer thereon to the plaintiff for that amount on the said goods; and the said goods were shipped on board the said ship at —— aforesaid, to be carried therein on the said voyage, and the plaintiff was then and thence until and at the time of the loss hereinafter mentioned interested in the said goods to the amount of all the moneys by him insured thereon; and the said ship, with the said goods on board thereof, sailed on the said voyage, and afterwards, whilst the said ship with the said goods on board thereof was proceeding on the said voyage, and during the continuance of the said risk, the said goods were by perils so insured against as

aforesaid wholly lost, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £—— by the defendant; yet the defendant has not paid the same.

Like counts on a policy of insurance upon cargo and freight: Benson v. *Chapman,* 8 C. B. 950; *Sutherland* v. *Pratt,* 11 M. & W. 296; *Cunard* v. *Hyde,* 27 L. J. Q. B. 408; *Lozano* v. *Janson,* 28 L. J. Q. B. 337.

On a policy upon an advance made on account of freight: Wilson v. *Martin,* 25 L. J. Ex. 217; 11 Ex. 684.

On a Policy of Insurance upon particular Goods to recover for a general average Loss.

That the plaintiff, by a policy of insurance bearing date the —— day of ——, A.D. ——, caused himself to be insured at and from —— to a port of discharge in the United Kingdom, upon certain goods in the ship ——, beginning the adventure from the loading thereof on board the said ship as above, and continuing until they should be safely discharged and landed, against perils of the seas [etc. *according to the policy, stating those perils from which the loss arose*]; the said goods being warranted free from average, unless general, or the ship should be stranded [*or as the case may be, according to the kind of goods*]; and the defendant, for a certain premium paid to him by the plaintiff, subscribed the said policy for £——, and became an insurer thereon to the plaintiff for that amount on the said goods; and the said goods were shipped on board the said ship at —— aforesaid to be carried therein on the said voyage, and the plaintiff was then and thence until and at the time of the loss hereinafter mentioned interested in the said goods to the amount of all the moneys by him insured thereon; and the said ship, with the said goods on board thereof, sailed from —— aforesaid on the said voyage, and whilst she was proceeding on the said voyage, and during the continuance of the said risk, the said ship and the said goods were by the said perils insured against brought into great danger of being lost, wherefore the master of the said ship, for the general safety and preservation of the said ship and of the said goods on board thereof, was necessarily obliged to cut away and cast overboard, and did cut away and cast overboard the masts, yards, sails, ropes, anchors, and rigging of the said ship, whereby the same were wholly lost, and by reason thereof the plaintiff, in respect of his interest in the said goods then being on board of the said ship, became liable to bear and pay a proportionable part of the value of the said masts, yards, sails, ropes, anchors, and rigging, and thereby sustained a general average loss amounting to £—— per cent. for each and every hundred pounds so by him insured as aforesaid, whereby the defendant became liable to pay to the plaintiff £——, for and in respect of the said £—— so by him insured as aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £—— by the defendant; yet the defendant has not paid the same.

A like count on a policy of insurance on freight paid in advance: Hall v. *Janson*, 4 E. & B. 500.

Count on a policy of insurance on a ship to recover a general average loss, paid by reason of goods having been thrown overboard: Milward v. *Hibbert*, 3 Q. B. 120; *Miller* v. *Titherington*, 30 L. J. Ex. 217; 6 H. & N. 278.

On a Policy of Insurance upon the Cargo of a Ship to recover for particular Average or partial Loss of the Goods (setting out the Policy verbatim) (a).

That the plaintiff, on the —— day of ——, A.D. ——, caused to be made a policy of insurance, with certain memoranda thereunder written in the words and figures following, that is to say [*here set out the policy and memoranda verbatim*], of all which premises the defendant had notice; and thereupon in consideration that the plaintiff paid to the defendant £——, as a premium for the insurance of £——, upon the said goods in the said policy mentioned as aforesaid, the defendant became and was an insurer to the plaintiff as aforesaid, and duly subscribed the said policy as such insurer of the said £——, upon the said goods to be carried in the said ship on the said voyage; and divers goods [*to wit* ——], being the goods in the said policy mentioned, were shipped at —— aforesaid, in and on board of the said ship, to be carried therein on the said voyage, and *G. H.*, *I. K.*, and *L. M.*, or some or one of them then and thence until and at the time of the loss hereinafter mentioned, were or was interested in the said goods to the amount of all the moneys insured thereon, and the said insurance was made for the use and benefit, and on the account of the person or persons so interested; and the said ship, with the said goods on board thereof, departed from —— aforesaid on her said voyage, and afterwards, whilst the said ship was proceeding on her said voyage, and during the continuance of the said risk, the said goods being then on board of the said ship were by the perils insured against by the said policy injured and damaged to an extent exceeding £—— per cent. [*the limit provided against in the memorandum*], within the meaning of the said policy, and the defendant's proportion of the said average loss, in respect of the sum of £——, so insured by the defendant as aforesaid, amounted to £——, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the last-mentioned sum by the defendant; yet the defendant has not paid the same.

Like counts: Luckie v. *Bushby*, 13 C. B. 864; *Corcoran* v. *Gurney*, 1 E. & B. 456; *Dawson* v. *Wrench*, 3 Ex. 359.

Upon a policy containing a memorandum against particular average for a total loss of part of the goods: Janson v. *Ralli*, 25 L. J. Q. B. 300.

On a policy of insurance upon profits of cargo or goods: Stockdale

(a) As to the meaning of "particular average," see the *Great Indian Peninsula Ry. Co.* v. *Saunders*, 1 E. B. & S. 41.

v. *Dunlop*, 6 M. & W. 224; *M'Swiney* v. *Royal Exchange Ass.*, 14 Q. B. 634; *Halhead* v. *Young*, 25 L. J. Q. B. 290; 6 E. & B. 312; *Smith* v. *Reynolds*, 25 L. J. Ex. 337; 1 H. & N. 221; *Chope* v. *Reynolds*, 28 L. J. C. P. 194; 5 C. B. N. S. 642.

On a policy of insurance upon the passage-money of emigrants, subject to ss. 47–51 of the Passengers Act, 15 & 16 *Vict. c.* 44: *Gibson* v. *Bradford*, 4 E. & B. 586; *Willis* v. *Cooke*, 25 L. J. Q. B. 16; 5 E. & B. 641.

On a policy of insurance upon a bottomry bond: Simonds v. *Hodgson*, 3 B. & Ad. 50.

On a policy of insurance upon a share in the Atlantic Telegraph Company: Paterson v. *Harris*, 30 L. J. Q. B. 354; 1 E. B. & S. 336.

Against an individual member of an unincorporated company or partnership, on a policy charging the insurance on the capital stock of the company only: Dawson v. *Wrench*, 3 Ex. 359; *Reid* v. *Allan*, 4 Ex. 326; *Hallett* v. *Dowdall*, 18 Q. B. 2.

Against a company registered under 7 & 8 *Vict. c.* 110, *on a policy charging the insurance on the capital stock of the company only* (*a*): *Halket* v. *Merchant Traders Ins. Co.*, 13 Q. B. 960.

Counts upon time policies: Hollingworth v. *Brodrick*, 7 A. & E. 40; *Redmond* v. *Smith*, 7 M. & G. 457; *Milward* v. *Hibbert*, 3 Q. B. 120; *Michael* v. *Tredwin*, 25 L. J. C. P. 83; 17 C. B. 551; *Michael* v. *Gillespy*, 26 L. J. C. P. 306; 2 C. B. N. S. 627; *Gibson* v. *Small*, 16 Q. B. 128; 4 H. L. Cases, 353; *Fawcus* v. *Sarsfield*, 25 L. J. Q. B. 249; 6 E. & B. 192; *Russell* v. *Thornton*, 29 L. J. Ex. 9; 4 H. & N. 788.

By the shipowner against the owner of goods to recover general average in respect of damage to the ship: Birkley v. *Presgrave*, 1 East, 220; *Price* v. *Noble*, 4 Taunt. 123; *and see Job* v. *Langton*, 26 L. J. Q. B. 97.

Indebitatus count against the owner of goods for general average, in respect of loss incurred in preserving the ship and cargo: Frayes v. *Worms*, 10 C. B. N. S. 149.

By the owner of goods against the shipowner for a general average loss in respect of goods cast overboard: Gould v. *Oliver*, 4 Bing. N. C. 134.

By the owner of goods lost against the owner of goods saved for general average: Behn v. *Kemble*, 7 C. B. N. S. 260.

Count by the underwriter for money received, to recover back the

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(*a*) On a judgment obtained upon such a policy, execution cannot be issued against individual shareholders of the company, under ss. 66 and 68 of the statute. (*Halket* v. *Merchant Traders Ins. Ass.*, 13 Q. B. 960; *Hassell* v. *Merchant Traders Ins. Ass.*, 4 Ex. 525; Ex. p. *Prince of Wales Ass. Co.*, 27 L. J. C. 798; 28 L. J. C. 335.)

insurance money paid on a supposed loss: Bilbie v. *Lumley*, 2 East, 469.

Count by an underwriter against the party insured, to recover back a payment made as for a loss, on an express agreement that the money should be returned if the vessel should prove not to be lost: Jones v. *Nicholson*, 10 Ex. 28.

Counts against an insurance broker, see ante, p. 101.

By an insurance broker for premiums: post, "*Insurance Broker*," p. 165.

Insurance; II. Life Policies (*a*).

On a Policy of Insurance on the Life of a third Person.

(*See the form of commencement, ante, p.* 21.) That by a policy of insurance bearing date the —— day of ——, A.D. ——, made by [*or* sealed with the common seal of] the defendants, after reciting

(*a*) Policies of insurance on lives are subject to the statute 14 Geo. III. c. 48, which enacts, by s. 1, "that from and after the passing of this Act no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

By s. 2, "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote."

By s. 3, "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events."

The interest in this statute means, in general, pecuniary interest. The interest of a father in the life of a child is not sufficient alone to support an insurance on the child's life. (*Halford* v. *Kymer*, 10 B. & C. 724.) But a wife may insure her husband's life, and the husband his wife's. (*Reed* v. *Key*, Peake's Add. Cases, 70; *Huckman* v. *Fernie*, 3 M. & W. 505.) It is sufficient that there is an interest in the life of the person insured at the time of effecting the insurance; and it is immaterial that it ceases afterwards. The value of the interest at the date of the policy may be recovered on the death, but no more. (*Dalby* v. *India and Lond. Ins. Co.*, 24 L. J. C. P. 2; 15 C. B. 365; overruling *Godsall* v. *Boldero*, 9 East, 72; 2 Smith's L. C. 5th ed. 222; as to the interest at the date of the policy, see *Law* v. *London Indisputable Co.*, 24 L. J. C. 196.)

Under s. 2, it is not sufficient for the name of the party interested merely to appear in the policy, but it must be inserted therein as the name of the party interested. (*Hodson* v. *Observer Life Ass. So.*, 8 E. & B. 40; 26 L. J. Q. B. 303.)

By the 16 & 17 Vict. c. 59, s. 6, it is enacted, that for better securing the stamp duties by law chargeable on policies of insurance upon lives, and for preventing frauds in respect of any such insurances: "Every person who

that the plaintiff had proposed to effect an insurance with the defendants on the life of *G. H.*, and had delivered to them a declaration setting forth the age and state of health of the said *G. H.* and other things, and that it had been agreed that the said declaration should be the basis of the said insurance, and that the plaintiff had paid to the defendants £——, as a consideration for the insurance of the sum hereinafter mentioned on the life of the said *G. H.* for a year from the —— day of ——, A.D. ——, and had agreed to pay a like sum on the —— day of —— in each succeeding year during the life of the said *G. H.*, it was declared that if the said *G. H.* should depart this life within the said year or in any succeeding year, for which such payment as aforesaid should have been made, the plaintiff should be paid out of the capital stock and funds of the said company, within three calendar months after the decease of the said *G. H.* should have been duly notified to the directors of the said company by the certificate of his burial, or by such other vouchers as they might reasonably require, the sum of £——; provided always, that the capital stock and funds of the said company should alone be liable to pay the demand thereupon under the said policy; and that if anything in the said declaration was untrue, the said policy should be void; and also that the said policy should become void if the said *G. H.* should, without the consent of the directors for the time being of the said company, engage in the actual service of the army or navy, or go beyond the limits of Europe, or upon the seas, unless in passing from one part of the British isles to another, or if the said *G. H.* should die by his own hands, or by the hands of justice; and at the time of the making of the said policy the plaintiff was interested in the life of the said *G. H.* to the amount so insured thereon as aforesaid; and afterwards and whilst the said policy remained in force the said *G. H.* died, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach hereinafter alleged, and nothing happened or was done to prevent him from maintaining the same; yet the plaintiff has not been paid the said £—— out of the capital stock and funds of the said company, and the same is wholly due and unpaid.

Like counts: Gurney v. *Rawlins*, 2 M. & W. 87; *Foster* v. *Mentor Life Ass. Co.*, 3 E. & B. 48; *Jones* v. *Provincial Ass. Co.*,

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shall make, or agree to make, or shall receive any premium or valuable consideration for making, any assurance or insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives, shall, within one calendar month after the payment or giving any such premium or consideration, make out and sign or execute, or cause and procure to be made out and signed or executed upon vellum, parchment, or paper, duly stamped, a policy of such assurance or insurance, and have the same ready to be delivered to the party entitled thereto, and shall, upon demand made by any such party, or any agent in that behalf duly authorized, deliver the same to him, or in default in any of the cases aforesaid shall forfeit £50: Every person who at the time of the payment or giving of any such premium or consideration, shall be managing director of, or the secretary to, or other principal officer of any society or company receiving any such premium or consideration, shall be deemed to be a person making or agreeing to make such assurance or insurance, and shall be subject and liable to the penalty this Act imposes for any such default as aforesaid."

3 C. B. N. S. 65; *Prince of Wales Ass. Co.* v. *Harding*, 27 L. J. Q. B. 297; *Pritchard* v. *Merchants Ins. Co.*, 3 C. B. N. S. 622; 27 L. J. C. P. 169.

On a life policy, with the premiums payable quarterly: Sheridan v. *Phœnix Life Ass. Co.*, 27 L. J. Q. B. 227; 31 L. J. Q. B. 91.

On a policy made by one person on the life of another for the use and on account of the latter: Hodson v. *Observer Life Ass. Co.*, 26 L. J. Q. B. 303; 8 E. & B. 40.

On a policy of insurance made by a person on his own life: Cazenove v. *British Equitable Ass. Co.*, 28 L. J. C. P. 259; 6 C. B. N. S. 437.

Count on a covenant by defendant not to do anything to avoid a policy effected on his life by the plaintiff, for avoiding the policy by going abroad: Vyse v. *Wakefield*, 6 M. & W. 442.

Count on a Covenant to keep up a Policy of Insurance assigned as Security for a Debt.

That by a deed bearing date the —— day of ——, A.D. ——, the defendant assigned to the plaintiff a policy of insurance on the life of the defendant, granted by the —— company, dated the —— day of ——, A.D. ——, and numbered ——, for the sum of £——, and, subject to the annual premium of £——, together with all moneys insured or to become payable by or under the said policy, for securing to the plaintiff the payment of the sum of £——, with interest thereon; and the defendant by the said deed covenanted with the plaintiff that the defendant would from time to time, so long as any money should remain due under the said security, pay the said premium of £——, and any other premiums or sums for the time being necessary for keeping up the said policy on the first day on which the same respectively ought to be paid, and would forthwith deliver the receipt for the same to the plaintiff, and that in case the defendant should neglect to pay any of such premiums and sums of money as aforesaid, the plaintiff should be at liberty to pay all premiums and other sums of money necessary for keeping up the said policy, and that the defendant would on demand repay to the plaintiff all such sums of money so paid by him as aforesaid, with interest thereon at £—— per centum per annum from the time of the same respectively having been paid; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breaches hereinafter mentioned of the defendant's said covenant, yet the defendant did not pay —— of the said annual premiums, which after the execution of the said deed became due and were necessary to be paid for keeping up the said policy, but neglected so to do, and the plaintiff thereupon duly paid the said premiums, the same being necessary for keeping up the said policy, and afterwards duly demanded repayment thereof, with interest thereon as aforesaid, from the defendant; yet the defendant did not repay the same or any part thereof, or the said interest thereon.

Like counts: Bennett v. *Burton*, 12 A. & E. 657; *Warburg* v.

Tucker, 24 L. J. Q. B. 317; 28 L. J. Q. B. 56; 5 E. & B. 384; *Young* v. *Winter*, 16 C. B. 401; *National Assurance Co.* v. *Best*, 27 L. J. Ex. 19; 2 H. & N. 605.

Insurance; III. Fire Policies.

On a Policy of Insurance against Fire.

(*See the form of commencement, ante, p.* 21.) That by a policy of insurance bearing date the —— day of ——, A.D. ——, made by [*or* sealed with the common seal of] the defendants, after reciting that the plaintiff had paid the defendants £——, for insuring against loss or damage by fire £—— on a dwelling-house in the said policy described, and £—— on the furniture and goods in the said dwelling-house, for a year from the —— day of ——, A.D. ——, and had agreed to pay the defendants on the —— day of —— in every succeeding year during the continuance of the said policy the like sum of £——, it was declared that (subject to the conditions indorsed on the said policy, and which constituted the basis of the said insurance) the plaintiff should be paid out of the capital stock and funds of the said company the amount of all such damage and loss as he should suffer by fire on the property in the said policy mentioned, not exceeding the said sums so insured thereon respectively as aforesaid, during the said year, from the —— day of ——, A.D. ——, or at any time afterwards, so long as the plaintiff should pay the said sum of —— yearly as aforesaid, and the defendants should accept the same; and the said conditions are as follows [*here set out verbatim, or by way of recital, such of the conditions as are of the essence of the contract, and material to the cause of action* (*a*)]; and the plaintiff, at the time of making of the said policy, and thence until and at the time of the damage and loss hereinafter mentioned, was interested in the said several premises so insured as aforesaid, to the amounts so insured thereon respectively; and after the making of the said policy, and whilst it was in force, the said several premises so insured as aforesaid were burnt and destroyed by fire, whereby the plaintiff suffered damage and loss on the said dwelling-house, and on the said furniture and goods respectively, to the several amounts so insured thereon respectively as aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action [and nothing happened or was done to prevent him from maintaining the same]; yet the plaintiff has not been paid out of the said capital stock and funds of the said company, the amount of the said damage and loss, to the amount of the said sums so insured respectively as aforesaid, and the same remains wholly unpaid.

Like counts: Roper v. *Lendon*, 28 L. J. Q. B. 260; *Pim* v. *Reid*, 6 M. & G. 1; *Sillem* v. *Thornton*, 3 E. & B. 868; *Stokes* v. *Cox*,

(*a*) Where the declaration was framed on the body of the policy, and did not state or refer to the rules and regulations indorsed upon the policy and incorporated therein by reference, the omission was held a fatal variance. (*Strong* v. *Rule*, 3 Bing. 315.)

25 L. J. Ex. 291; 26 L. J. Ex. 113; 1 H. & N. 533; *Glen* v. *Lewis*, 8 Ex. 607; *Mason* v. *Harvey*, 8 Ex. 819; *Baxendale* v. *Harvey*, 4 H & N. 445.

A like count on a cotton-mill, with special conditions as to risk: Whitehead v. *Price*, 2 C. M. & R. 447.

On a policy of insurance against fire on goods held in trust by plaintiffs as bailees, warehousemen, wharfingers, carriers, etc.: Waters v. *Monarch Fire Ins. Co.*, 25 L. J. Q. B. 102; 5 E. & B. 870; *London & N. W. Ry. Co.* v. *Glyn*, 28 L. J. Q. B. 188; 1 E. & E. 652.

On a policy giving the defendants an option to reinstate, which they elected to do, and breach: Brown v. *Royal Ins. So.* 28 L. J. Q. B. 275.

Insurance; IV. Against Accidents (*a*).

On a contract of insurance of a railway passenger against accident whilst travelling on the railway: Theobald v. *Railway Passengers Ass. Co.*, 10 Ex. 45.

On a policy of insurance against bodily injury from accident: Shilling v. *Accidental Death Insurance Co.*, 26 L. J. Ex. 266; 2 H. & N. 42.

On a policy of insurance against accidents, to continue so long as the defendants should accept premiums, with days of grace for payment of the premiums: Simpson v. *Accidental Death Ins. Co.*, 26 L. J. C. P. 289; 2 C. B. N. S. 257. [*As to days of grace, see Pritchard* v. *Merchants Ins. Co.*, 27 L. J. C. P. 169; 3 C. B. N. S. 622.]

Insurance Broker (*b*).

Indebitatus Count for Brokerage and for Premiums for Underwriting.

Money payable by the defendants to the plaintiff for work done

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(*a*) As to the meaning of "accident" see *Sinclair* v. *Maritime Passengers Ass. Co.*, 30 L. J. Q. B. 77; *Hooper* v. *Accidental Death Ins. Co.*, 5 H. & N. 546; *Hiorns* v. *Railway Passengers Ass. Co.*, 5 H. & N. 211; *Trew* v. *Railway Passengers Assurance Co.*, 6 H. & N. 839; as to the meaning of "Railway accident" see *Theobald* v. *Railway Passengers Ass. Co.*, 10 Ex. 45.

(*b*) An insurance broker may recover premiums from the insured as money paid, where there has been a payment or something equivalent. The acknowledgment of payment by the underwriter, in the policy of insurance, is equivalent to payment as against the insured. (*Dalzell* v. *Mair*, 1 Camp. 532, 534 (*a*); *Foy* v. *Bell*, 3 Taunt. 493.) But a covenant in a policy under seal by the broker, to pay the premiums, is not equivalent to payment; and the broker cannot recover the amount of the premiums due under the covenant as money paid. He may, however, recover the amount of such premiums under an indebitatus count, for money due for premiums for policies caused and procured to be effected by the plaintiff. (*Power* v. *Butcher*, 10 B. & C. 329.)

by the plaintiff as an insurance-broker and otherwise, for the defendant at his request, and for money paid by the plaintiff, for the defendant at his request, for premiums for insuring ships, goods, and other things and for losses upon policies of insurance underwritten by the plaintiff for the defendant at his request. [*The common indebitatus counts for work done and money paid would be sufficient, ante,* p. 32 n. (*b*)].

Counts against an insurance broker, see ante, p. 101.

INTEREST. *See ante, p.* 43.

JUDGMENTS.

Count on a Judgment of one of the Superior Courts (*a*).

Middlesex. (*Venue local.*) That the plaintiff, on the —— day of ——, A.D. ——, in the court of —— at Westminster, by the judgment of the said court, recovered against the defendant £—— to-

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(*a*) In an action upon judgment of a Court of Record the venue is local, and must be laid in the county where the record is. Upon a judgment of one of the superior courts the venue must be laid in Middlesex (1 Chit. Pl. 7th ed. 281), although in a declaration on a writ of revivor, and, it seems, of *scire facias*, the venue may be laid in any county. (C. L. P. Act, 1852, ss. 131, 132.)

By 43 Geo. III. c. 46, s. 4, in actions on judgments recovered, the plaintiff shall not recover or be entitled to any costs of suit, unless the court or a judge thereof shall otherwise order. And such an order will not in general be made where the plaintiff might have realized his judgment by execution or otherwise. (See 1 Chit. Pr. 11th ed. 493.) The statute does not apply to an action on a judgment and also on a distinct cause of action; and in such case, if the plaintiff succeeds, he does not require an order for his costs under the statute. (*Jackson* v. *Everett*, 31 L. J. Q. B. 59.) Where an action is brought on a judgment for a debt under £20 and costs, in order to obtain a judgment above £20, upon which the defendant may be taken in execution, the court will not allow the plaintiff his costs. (*Adams* v. *Ready*, 6 H. & N. 261; but see *Slater* v. *Mackay*, 8 C. B. 553.)

An action will also lie on the judgment of an inferior court (*Read* v. *Pope*, 1 C. M. & R. 302; *Williams* v. *Jones*, 13 M. & W. 628); but not on the judgment of a county court established by 9 & 10 Vict. c. 95, etc. (*Berkeley* v. *Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281; *Austin* v. *Mills*, 9 Ex. 288.) Nor can an action be brought in a county court on any judgment of a superior court. (19 & 20 Vict. c. 108, s. 27.) An action will not in general lie upon a decree of a court of equity (*Carpenter* v. *Thornton*, 3 B. & Ald. 52; *Henderson* v. *Henderson*, 6 Q. B. 228); but it will lie on the decree of a colonial court of equity. (*Sadler* v. *Robins*, 1 Camp. 253; *Henderson* v. *Henderson*, 6 Q. B. 288; *Henley* v. *Soper*, 8 B. & C. 16.) An action will not lie upon a rule of court or a judge's order. (*Dent* v. *Basham*, 9 Ex. 469; *Hookpayton* v. *Bussell*, 10 Ex. 24; *Sheehy* v. *Professional Life Assurance Co.*, 2 C. B. N. S. 211; 26 L. J. C. P. 301; and see *Tabor* v. *Edwards*, 4 C. B. N. S. 1.) But if the order is founded on an agreement, an action will lie upon the agreement though the order is superadded. (*Wentworth* v. *Bullen*, 9 B. & C. 840, 850.)

gether with £—— for his costs of suit, which said judgment is still in force and unsatisfied.

Count on a judgment of the sheriff against a company for the purchase-money or compensation assessed for lands taken or injured, under the Lands Clauses Consolidation Act, 8 Vict. c. 18, s. 50. See "Company," ante, p. 123.

Count on a Judgment of a French Court(a).

That on the —— day of ——, A.D. ——, in the Empire of France,

(a) A foreign or colonial judgment in favour of a plaintiff, for a liquidated demand in money, establishes a debt between the parties, but does not merge or extinguish the original cause of action. The plaintiff may sue, in this country, upon the original cause of action, or upon the judgment recovered in the foreign or colonial court. (*Walker* v. *Witter*, Doug. 1; *Sadler* v. *Robins*, 1 Camp. 253; *Hall* v. *Odber*, 11 East, 118; per Tindal C. J. *Smith* v. *Nicolls*, 5 Bing. N. C. 208, 221; *Bank of Australasia* v. *Harding*, 9 C. B. 661.)

It seems now to be settled that a foreign judgment is conclusive between the parties upon the merits, and that any defences upon the merits which might have been pleaded in the original action, cannot be pleaded in an action on the judgment. (*Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Henderson* v. *Henderson*, 6 Q. B. 288; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; *Munroe* v. *Pilkington*, 31 L. J. Q. B. 81, 89; and see 2 Smith's L. C. 5th ed. 688.)

A foreign judgment may however be impeached for want of jurisdiction in the court, in respect of the matter of the suit or of the parties; (*Ferguson* v. *Mahon*, 11 A. & E. 179; and see *Robertson* v. *Struth*, 5 Q. B. 941) for errors on the face of the judgment, and for this purpose the reasons assigned in the judgment form part of it; (*Reimers* v. *Druce*, 26 L. J. C. 196; 23 Beav. 150) for a mistake made by the foreign court in English law; (*Novelli* v. *Rossi*, 2 B. & Ad. 757; and see *Castrique* v. *Imrie*, 30 L. J. C. P. 177; 8 C. B. N. S. 405) but not for an alleged mistake in its own law; (*Munroe* v. *Pilkington*, 31 L. J. Q. B. 86, 89) for repudiating English law where it was necessary to decide the case; (*Simpson* v. *Fogo*, 29 L. J. C. 657; *Reimers* v. *Druce*, *supra*; and see *Munroe* v. *Pilkington*, 31 L. J. Q. B. 81) as being contrary to natural justice; (see *Buchanan* v. *Rucker*, 1 Camp. 63; *Price* v. *Dewhurst*, 8 Pinnar, 279) because not final and conclusive; (*Sadler* v. *Robins*, 1 Camp. 253; *Plummer* v. *Woodburne*, 4 B. & C. 625; *Patrick* v. *Sheddon*, 2 E. & B. 14; *Frayes* v. *Worms*, 10 C. B. N. S. 149) on the ground that the defendant was not summoned, and had no notice of the proceedings; (*Buchanan* v. *Rucker*, 1 Camp. 63; 9 East, 192; *Reynolds* v. *Fenton*, 3 C. B. 187) on the ground that it was obtained by fraud; (*Bowles* v. *Orr*, 1 Y. & C. 464.) And see further as to how far a foreign judgment is conclusive, and upon what grounds it may be controverted, 2 Smith's L. C. 5th ed. 683; *Westlake's International Law*, c. xii; *Reimers* v. *Druce*, 26 L. J. C. 196; 23 Beav. 150.

An appeal pending in the foreign court is not a good plea to an action on a foreign judgment, though it may afford ground for staying execution in the action. (*Munroe* v. *Pilkington*, 31 L. J. Q. B. 81.)

A declaration upon the judgment of a foreign court need not state that the court had jurisdiction over the parties or the cause, (*Robertson* v. *Struth*, 5 Q. B. 941) every presumption being made in favour of a foreign judgment. (*Ib.*; *Henderson* v. *Henderson*, 6 Q. B. 288.)

As to the mode of proving foreign and colonial judgments, see 14 & 15 Vict. c. 99, s. 7.

in a suit depending between the now plaintiff and defendant in the court of ——, being a court of the said Empire duly holden, and having jurisdiction in that behalf, the plaintiff recovered against the defendant by the judgment of the said court, and according to the laws of the said Empire the sum of —— francs, which is equivalent in English money to £——, and which the now defendant was, by the said court, adjudged and ordered to pay to the now plaintiff, and the said judgment is still in force and unsatisfied.

Like counts: Vallee v. *Dumergue*, 4 Ex. 290; *De Cosse Brissac* v. *Rathbone*, 30 L. J. Ex. 238; 6 H. & N. 301.

Count on a decree of the Tribunal of Commerce at Brussels: Reynolds v. *Fenton*, 3 C. B. 187; *Meeus* v. *Thellusson*, 8 Ex. 638.

Count on a judgment of the Supreme Court of New York: Munroe v. *Pilkington*, 31 L. J. Q. B. 81.

Count on a Scotch Decreet.

That on the —— day of ——, A.D. ——, in the Sheriff's Court of the county of —— in Scotland, in an action then depending in the said court at the suit of the now plaintiff against the now defendant, the plaintiff by the judgment of the said court then having lawful jurisdiction and authority in that behalf recovered against the defendant the sum of £——, for a debt due from the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant with legal interest thereon at five per centum per annum from the —— day of ——, then last until payment, and the sum of £—— for costs of suit, which sums of money and interest the defendant was by the said court adjudged and ordered to pay to the plaintiff, and the said judgment is still in force and unsatisfied.

Like counts: Douglas v. *Forrest*, 4 Bing. 686; *Cowan* v. *Braidwood*, 1 M. & G. 882; *Patrick* v. *Shedden*, 2 E. & B. 14.

Count for costs awarded by a decreet of the Court of Session in Scotland in a suit for divorce: Russell v. *Smyth*, 9 M. & W. 810.

Count on a judgment of the court of Queen's Bench in Ireland: Sheehy v. *Professional Life Ass. Co.*, 13 C. B. 787. *On a colonial judgment: Robertson* v. *Struth*, 5 Q. B. 941. *On a decree of a colonial Court of Equity: Henderson* v. *Henderson*, 6 Q. B. 288.

Count against a member of a colonial banking company upon a judgment obtained in the colony against the chairman of the company under a colonial Act: Bank of Australasia v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

Against a shareholder of a banking company in India upon a judgment obtained in India against the secretary of the company under an Act of the Indian Legislature: Kelsall v. *Marshall*, 26 L. J. C. P. 19; 1 C. B. N. S. 241.

Count on an order of the judicial committee of the Privy Council for the payment of the costs in an appeal: Hutchinson v. *Gillespie*, 25 L. J. Ex. 103; 11 Exch. 798.

Land Tax.

Action for the amount of land-tax by the person who has redeemed it against the person beneficially entitled to the land, under the Statute 42 Geo. III. c. 116, *s.* 123; *Ward* v. *Const,* 10 B. & C. 635.

Landlord and Tenant.

Indebitatus Count for the Use of a House and Land (C. L. P. Act, 1852, Sched. B. (a).

Money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff.

Indebitatus Count for the Use of Lodgings.

Money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of rooms and parts of a messuage [and furniture and goods therein] of the plaintiff.

(*a*) *Use and Occupation.*]—Under this count the plaintiff can recover rent, or a compensation by way of rent, for the period during which the defendant has occupied the plaintiff's land, etc., under any tenancy created by simple contract, express or implied, but not where the tenancy has been under a lease by deed.

A contract to pay a fair compensation by way of rent for use and occupation is implied by law from the fact that lands, etc., belonging to the plaintiff have been occupied by the defendant by the plaintiff's permission; the amount of compensation in such case depends on the value of the premises and on the duration of the occupation. As soon as the occupation ceases the implied contract ceases; and as no express time is limited for payment, the compensation accrues due from day to day. (*Gibson* v. *Kirk,* 1 Q. B. 850; *Churchward* v. *Ford,* 26 L. J. Ex. 354; 2 H. & N. 446; *Sloper* v. *Saunders,* 29 L. J. Ex. 275). An implied contract is, of course, negatived by an express agreement on the same matter; and the amount of rent and time of payment would then be determined by the agreement.

This form of action lies either at common law or under the statute 11 Geo. II. c. 19, s. 14. (*Gibson* v. *Kirk, supra.*) By this Act it is provided that the landlord, where the agreement is not by deed, may recover a reasonable satisfaction for the lands, etc., held or occupied by the defendant in an action on the case (meaning *assumpsit*) for the use and occupation of what was so held or enjoyed; and if in evidence any parol demise or agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of the damages to be recovered.

The mere fact of the plaintiff's ownership of the land, etc., and of the occupation by the defendant, is sufficient *primâ facie* evidence of a contract to support this action. (*Hellier* v. *Silcox,* 19 L. J. Q. B. 295; *Churchward* v. *Ford,* 26 L. J. Ex. 354; 2 H. & N. 446.) But the presumption from such evidence may be rebutted by showing that the occupation was adverse to the consent of the plaintiff, or that it was under a contract with a third party, a stranger to the plaintiff, or any circumstances which are inconsistent with a contract between the plaintiff and the defendant. (*Churchward* v. *Ford, supra; Cox* v. *Knight,* 25 L. J. C. P. 314; 18 C. B. 645; *Turner*

Indebitatus Count for Board and Lodging (*a*).

Money payable by the defendant to the plaintiff for board and lodging, washing, attendance, and other necessaries and goods, by the plaintiff found and provided for the defendant at his request.

Indebitatus Count for the Use of a Fishery, (*C. L. P. Act*, 1852, *Sched. B.* 10.)

Money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, of a fishery of the plaintiff.

For the use of veins of minerals: Jones v. *Reynolds*, 4 A. & E. 805.

For the use of pasture and eatage of grass, let by the plaintiff to the defendant: Sutton v. *Temple*, 12 M. & W. 52, *and see ante*, p. 54.

For the use of a watercourse: Davis v. *Morgan*, 4 B. & C. 8.

Action against corporations for use and occupation: Lowe v. *London and N. W. Ry. Co.*, 18 Q. B. 632; *Finlay* v. *Bristol and E. Ry. Co.*, 7 Ex. 409.

By churchwardens and overseers for the use and occupation of parish property, under 59 *Geo. III. c.* 12, *s.* 17: *Rumball* v. *Munt*, 8 Q. B. 382; *Hardon* v. *Hesketh*, 28 L. J. Ex. 137; 4 H. & N. 175.

By an Executor or Administrator for Use and Occupation before and after the Death.

(*Commence with one of the forms, ante, pp.* 12, 14.) Money payable by the defendant to the plaintiff, as executor [*or* administrator] as aforesaid, for the defendant's use, in the lifetime of the said *C. D.* and by his permission, of a messuage and lands of the said *C. D.*, and for the defendant's use after the death of the said *C. D.* by the permission of the plaintiff as executor [*or* administrator] as aforesaid, of a messuage and lands of the plaintiff as executor [*or* administrator] as aforesaid.

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v. *Cameron Coal Co.*, 5 Ex. 932; *Sloper* v. *Saunders*, 29 L. J. Ex. 275; *Levy* v. *Lewis*, 6 C. B. N. S. 766; 30 L. J. C. P. 141.)

The assignee of the reversion may maintain this action (*Rennie* v. *Robinson*, 1 Bing. 147; *Standen* v. *Chrismas*, 10 Q. B. 135), but can only recover in respect of the use and occupation subsequent to the assignment. (*Mortimer* v. *Preedy*, 3 M. & W. 602.) So also the assignee of a mortgagor who has let a tenant into possession after the mortgage. (*Hickman* v. *Machin*, 28 L. J. Ex. 310; 4 H. & N. 716.) The action will also lie against the assignee of a tenancy created by simple contract who has occupied the premises. (*How* v. *Kennett*, 3 A. & E. 659.)

Under the former rules of pleading a count for rent on a demise was not allowed together with a count for use and occupation for the same rent. (*Arden* v. *Pullen*, 9 M. & W. 430.)

(*a*) A contract for board and lodging is not a contract for an interest in land within the Statute of Frauds, 29 Car. II., c. 3, s. 4, and need not be in writing. (*Wright* v. *Stavert*, 29 L. J. Q. B. 161.)

Against an Executor or Administrator for Use and Occupation by the Deceased (a).

(*Commence with one of the forms, ante, pp.* 13, 15.) Money payable by the defendant, as executor [*or* administrator] as aforesaid, for the use by the said *G. H.*, by the permission of the plaintiff, of a messuage and lands of the plaintiff.

Count upon a Lease for Rent. (C. L. P. Act, 1852, *Sched. B.* 23 (*b*).)

That the plaintiff let to the defendant a house, No. 401, Piccadilly, for seven years, to hold from the —— day of ——, A.D. ——, at £—— a year, payable quarterly, of which rent —— quarters are due and unpaid.

A like count: Ward v. *Lumley,* 29 L. J. Ex. 322; 5 H. & N. 656.

A like count by the assignee of the rent reserved: Allen v. *Bryan,* 5 B. & C. 512.

Count for rent upon a tenancy in fee subject to a rent-charge: Hardon v. *Hesketh,* 28 L. J. Ex. 137; 4 H. & N. 175.

(*a*) The common count for use and occupation will not lie against an executor or administrator in his representative capacity, in respect of occupation by him since the decease. In respect of such occupation, he can be charged in this form of action in his own right only. (*Wigley* v. *Ashton,* 3 B. & Ald. 101; *Atkins* v. *Humphrey,* 2 C. B. 654.) As to the liability of the executor or administrator and mode of suing when a term vested in the testator devolves on him, see *post,* p. 183 (*a*).

(*b*) Under this count the plaintiff can recover rent accrued due under a demise, whether by deed or by simple contract, and whether there has been an actual occupation under the demise or not. (1 Wms. Saund. 202 a, n. (1).) As to when it is not applicable see the next note.

By the common law it was not required that a demise of land, or of any corporeal hereditament, should be in writing. By the Statute of Frauds, 29 Car. II. c. 3, ss. 1, 2, all leases, estates, interests of freehold, or terms of years, or any uncertain interest in any lands or hereditaments, not put in writing, and signed by the parties so making the same, or their agents, lawfully authorized by writing, shall have the effect of leases or estates, at will only; except leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised.

And now by the statute 8 & 9 Vict. c. 106, s. 3, it is enacted that a lease required by law to be in writing, of any tenements or hereditaments made after the 1st October, 1845, shall be void at law unless made by deed. An instrument void as a lease under the statute, may be good as an agreement for a lease. (*Bond* v. *Rosling,* 1 B. & S. 371; *Rollason* v. *Leon,* 7 H. & N. 73.)

A lease of incorporeal hereditaments, as a lease of a right of shooting (*Bird* v. *Higginson,* 6 A. & E. 824,) or a lease of tithes (*Gardiner* v. *Williamson,* 2 B. & Ad. 336,) was always required by law to be by deed, otherwise it is void.

The action on the demise will lie notwithstanding the deed creating it has subsequently been cancelled, and the demise may be proved by the cancelled deed. (*Ward* v. *Lumley,* 29 L. J. Ex. 322; 5 H. & N. 656.)

Count upon a Covenant for Rent (a).

That the plaintiff by deed let to the defendant a house and land, to hold for —— years, from the —— day of ——, A.D. ——, at the yearly rent of £——, payable quarterly, and the defendant by the said deed covenanted with the plaintiff to pay him the said rent as aforesaid; and —— quarters of the said rent are due and unpaid.

Like counts: Haldane v. *Johnson*, 8 Ex. 689; *Smith* v. *Humble*, 15 C. B. 321; *Johnson* v. *Gibson*, 1 E. & B. 415; *Houghton* v. *Kœnig*, 18 C. B. 235.

On a covenant in gross to pay rent: Pargeter v. *Harris*, 7 Q. B. 708.

Landlord against Tenant for not keeping the Premises in Tenantable Repair.

That the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff, upon the terms that the defendant should, during the said tenancy, keep the said messuage and premises in tenantable repair, order, and condition; and the defendant, during the said tenancy, did not keep the said messuage and premises in tenantable repair, order, and condition.

Like counts: Richardson v. *Gifford*, 1 A. & E. 52; *Burdett* v. *Withers*, 7 A. & E. 136.

A like count specifying the nature of the repair: Dietrichsen v. *Giubilei*, 14 M. & W. 845; *stating special damage in consequence of inability to let: Woods* v. *Pope*, 1 Bing. N. C. 467; *against executors of deceased tenant: White* v. *Nicholson*, 4 M. & G. 95.

For not using the Premises in a Tenant-like Manner (b).

That the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff [and of furniture and goods of the plaintiff therein], upon the terms that the defendant should use the said messuage and premises [and furniture and goods] in a tenant-like and proper manner during the said tenancy; and the defendant, during the said tenancy, used the said messuage and premises [and furniture and goods] in an untenant-like and improper manner.

Like counts: Bickford v. *Parson*, 5 C. B. 920; *Morrison* v. *Chadwick*, 7 C. B. 266; *Standen* v. *Chrismas*, 10 Q. B. 135; *and see post*, "*Waste.*"

(*a*) This count lies against a lessee on an express covenant, notwithstanding an assignment of the lease and acceptance by the landlord of the assignee as his tenant (1 Wms. Saund. 240; 2 Wms. Saund. 302, n. (5)); under those circumstances the lessee would not remain liable on the mere reservation of rent in the lease. (*Wadham* v. *Marlowe*, 8 East, 314; 1 H. Bl. 437; 1 Wms. Saund. 241 *c.*)

(*b*) This count is founded on a condition implied by law from the mere fact of the tenancy, in the absence of any express agreement on the subject; but the contract to repair, on which the last precedent is framed, is not implied. (*Standen* v. *Chrismas*, 10 Q. B. 135; and see *Granger* v. *Collins*, 6 M. & W. 458); the two counts may be joined in the same declaration.

For not delivering up the Premises in good Repair.

That the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff for a term of —— years from the —— day of ——, A.D. ——, upon the terms, amongst other things, that the defendant should, at the expiration of the said term, deliver up to the plaintiff the said messuage and premises, with all fixtures thereon, in the same state and condition as they were in at the time of the defendant becoming such tenant as aforesaid, reasonable wear and tear only excepted; and the said term expired, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to a performance by the defendant of the said terms; yet the defendant did not, at the expiration of the said term, deliver up to the plaintiff the said messuage and premises, with all the fixtures thereon, in the same state and condition as they were in at the time of the defendant becoming such tenant as aforesaid, reasonable wear and tear only excepted.

Lessor against Lessee upon a Covenant to Repair. (C. L. P. Act, 1852, Sched. B. 24 (a).)

That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*], yet the said house was, during the said term, out of good and substantial repair.

A like count stating as special damage the plaintiff's inability to let the premises by reason of the want of repair: Woods v. *Pope*, 1 Bing. N. C. 467.

Lessor against Lessee upon a Covenant to Repair, subject to certain Exceptions.

That the plaintiff by deed let to the defendant a house, to hold for —— years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the plaintiff to keep the said house in good and substantial repair during the said term, casualties by fire or tempest [etc. *according to the covenant*] excepted; yet the said house during the said term was not in good and substantial repair, although no casualty by fire or tempest [etc. *according to the covenant*] happened thereto. [*The covenant should be*

(*a*) In an action by a landlord against a tenant for breach of a promise or covenant to keep the demised premises in repair, the measure of damages, during the continuance of the lease, is the diminution in value of the reversion (*Turner* v. *Lamb*, 14 M. & W. 412; *Doe* v. *Rowlands*, 9 C. & P. 734; *Smith* v. *Peat*, 9 Ex. 161); but where the lease is determined, as by forfeiture, the measure of damages is the sum it would cost to put the premises in the state of repair agreed upon. (*Davies* v. *Underwood*, 27 L. J. Ex. 113; 2 H. & N. 570). The amount of the damages also depends upon the condition of the premises at the time of the demise, the extent of the tenant's liability being construed with regard to that condition. (*Stanley* v. *Towgood*, 3 Bing. N. C. 4; *Burdett* v. *Withers*, 7 A. & E. 136; *Payne* v. *Haine*, 16 M. & W. 541.)

stated accurately with all the exceptions contained in it, as, casualties by fire, etc. (*Browne* v. *Knill*, 2 B. & B. 395); reasonable wear and tear (*Wright* v. *Goddard*, 8 A. & E. 144); *and the breach must follow the terms of the covenant in this respect.*]

Lessor against Lessee upon a Covenant to Repair, showing the Covenant and Breach fully set out.

That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for a term of twenty-one years from the —— day of ——, A.D. ——, determinable in the meantime as therein mentioned, and the defendant by the said deed covenanted with the plaintiff that he, the defendant, would at all times during the said term, when, where, and as often as occasion should require (casualties thereto by fire or tempest only excepted), well and substantially repair, maintain, tile, glaze, paint, pave, cleanse, empty, and keep in repair the said house thereby demised, and all the glass, windows, window-frames, window-shutters, wainscots, floors, stairs, partitions, paper and ceilings, and every part of the inside of the said house, and also all the walls, rails, fences, pavements, sinks, drains, wells, and watercourses thereunto belonging, and also paint or cause to be painted, with two coats of oil colour, in a good and workman-like manner, all the wood and iron-work on the outside of the said house once in every third year of the said term, and all the wood-work and parts usually painted on the inside thereof once in every seventh year of the said term; [and the said house, with the glass, windows, window-frames, window-shutters, wainscots, floors, stairs, partitions, paper, and ceilings, and every part of the inside of the said house, and also all the walls, rails, fences, pavements, sinks, drains, wells, and watercourses thereunto belonging, being so well and substantially repaired, maintained, tiled, glazed, painted, paved, cleansed, emptied, and kept in repair as aforesaid (except as aforesaid), should and would at the end, expiration, or other sooner determination of the said term, which should first happen, peaceably and quietly leave, surrender, and yield up to the plaintiff, together with all doors, locks, keys, bolts, bars, staples, hinges, hearth-stones, marble and other chimney-pieces, slabs, shutters, fastenings, wainscots, partitions, pipes and gutters of lead, shelves, dressers, and all other erections, buildings, improvements, fixtures, and things then in, upon, about, or affixed to the said house;] and although no casualty by fire or tempest happened to the said house or premises, yet the defendant did not at all times during the said term, when, where, and as often as occasion required, well and substantially repair, maintain, tile, glaze, paint, pave, cleanse, empty, and keep in repair the said house and premises as aforesaid, and did not paint or cause to be painted with two coats of oil colour, in a good and workmanlike manner, once in every third year of the said term all the wood and iron-work on the outside of the said house, nor once in every seventh year of the said term all the wood-work and parts usually painted in the inside thereof; [and the defendant at the expiration of the said term, which had not sooner determined, left, surrendered and yielded up to the plaintiff the said house and premises, without the same being so well and substantially repaired, maintained, tiled, glazed, painted, paved, cleansed, emptied, and kept in repair as aforesaid.]

Count by assignee of term against lessor on a covenant by the latter to repair, alleging special damage to the plaintiff in carrying on his trade and being obliged to remove: Green v. *Eales*, 2 Q. B. 225.

Count by lessee against underlessee for breach of covenant by the latter to repair, whereby the original lease was forfeited: Clow v. *Brogden*, 2 M. & G. 39.

A like count with special damage arising from the original landlord having sued the plaintiff: Walker v. *Hatton*, 10 M. & W. 249.

Count upon an express agreement by the tenant to keep the premises in repair on the same being first put into good repair by the plaintiff: Neale v. *Ratcliff*, 15 Q. B. 916.

Like counts where the landlord agreed to find timber and bricks for the repairs: Martyn v. *Clue*, 18 Q. B. 661; *Dean of Bristol* v. *Jones*, 28 L. J. Q. B. 201.

Count on a covenant by the tenant to repair, the tenant "taking sufficient houseboot, hedgeboot, gateboot," etc.: Dean of Bristol v. *Jones*, E. & E. 484.

Lessor against Lessee upon a Covenant to Insure from Loss by Fire.

That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the plaintiff that the defendant would, immediately upon the execution of the said deed, insure in the names as well of the plaintiff as of the defendant the said house thereby demised from and against all loss or damage by fire in the —— insurance office in London, or in some other insurance office to be approved of by the plaintiff, in a sum sufficient to cover the full value thereof, and keep the same so insured during the said term, and would upon request produce to the plaintiff the policy or policies of insurance which should be so made, and the receipts for the premiums, duties, and charges which should from time to time be payable in respect of such insurance; and that in default thereof the plaintiff should be at liberty to insure the said house as aforesaid, and to pay all such premiums, duties, and charges, as should be payable upon such insurance, and that the defendant would repay the amount thereof to the plaintiff; yet the defendant did not, after the execution of the said deed, insure in the names as well of the plaintiff as of the defendant the said house from and against all loss or damage by fire in the —— insurance office in London, or in any other insurance office approved of by the plaintiff, in a sum sufficient to cover the full value thereof, nor did he during the said term keep the said premises so insured as aforesaid, nor did he produce to the plaintiff, although requested by the plaintiff to do so, any such policies or receipts as aforesaid; and the plaintiff afterwards, upon such default, insured the said house as aforesaid, and paid certain premiums, duties, and charges which became and were payable upon such insurance, of which the defendant had notice, yet the defendant did not repay the amount thereof to the plaintiff.

Landlord against Tenant for not Cultivating a Farm according to the Custom of the Country, stating the Breach generally (*a*).

That the defendant became and was tenant to the plaintiff of a farm and land, upon the terms that the defendant should use and cultivate the said farm and land during the said tenancy in a husbandlike manner according to the custom of the country where the same were situate; yet the defendant during the said tenancy did not use and cultivate the said farm and land in a husbandlike manner according to the said custom.

Like counts: Harris v. *Mantle*, 3 T. R. 307; *Powley* v. *Walker*, 5 T. R. 373; *Earl of Falmouth* v. *Thomas*, 1 C. & M. 89; *Lord Hood* v. *Kendall*, 17 C. B. 262.

Landlord against Tenant for not Farming according to the Custom of the Country, stating particular Breaches.

That the defendant became and was tenant to the plaintiff of a farm and land, upon the terms that the defendant should use and cultivate the said farm and land during the said tenancy according to the course of good husbandry and the custom of the country where the same were situate; yet the defendant did not use and cultivate the said farm and land during the said tenancy according to the course of good husbandry and the said custom in this; that he had more than one-half of the arable land of the said farm in corn, and that he neglected to have one-fourth part of the said arable land in seeds; and that he permitted only a small portion and less than one-fourth of the said arable land to be in fallow or turnips; and that he sowed —— acres of the said arable land with two successive crops of wheat, and sowed —— acres of the said arable land with two successive crops of barley, the same being excessive and unreasonable crops for the said land; and that he carried away from the said farm many cart-loads of straw and of dung and of manure which had arisen and been made on the said farm during the said tenancy, and used and consumed the same elsewhere than on the said farm.

Like counts: Legh v. *Hewitt*, 4 East, 154; *Angerstein* v. *Handson*, 1 C. M. & R. 789; *Lord Hood* v. *Kendall*, 17 C. B. 260.

Counts for not farming according to the express terms of the demise: Lowndes v. *Fountaine*, 25 L. J. Ex. 49; 11 Ex. 487; *Hindle* v. *Pollitt*, 6 M. & W. 529; *Tooker* v. *Smith*, 1 H. & N. 732.

On a covenant to pay increased rent for pasture land if ploughed up or used for other purposes: Farrant v. *Olmius*, 3 B. & Ald. 692; *Aldridge* v. *Howard*, 4 M. & G. 921.

On a covenant in a lease not to lop trees, under a penalty for each

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(*a*) From the mere fact of a tenancy of a farm, whether under a written or parol agreement, or under a lease by deed, the law implies a promise on the part of the tenant to cultivate it in a husbandlike manner, and according to the custom of the country where the same is situate; unless the express contract is inconsistent with the custom. (*Wigglesworth* v. *Dallison*, 1 Doug. 201; *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154; *Wilkins* v. *Woods*, 17 L. J. Q. B. 319.)

tree so lopped over and above the value of the tree: Hurst v. *Hurst*, 4 Ex. 571.

On a covenant in a lease not to sell or carry away manure under an increased rent for every ton so sold or carried away: Leigh v. *Lillie*, 30 L. J. Ex. 25; 6 H. & N. 165.

Lessee against Lessor for Breach of Covenant for Title (a).

That the defendant by deed demised to the plaintiff a house, to hold for a term of —— years from the —— day of ——, A.D. ——, and thereby covenanted with the plaintiff that at the time of the making of the said demise the defendant had full and lawful power and authority to demise the said house to the plaintiff for the said term as aforesaid; yet the defendant, at the time of the making of the said demise had not full or lawful power or authority to demise the said house to the plaintiff for the said term as aforesaid; by reason whereof *G. H.* afterwards, and during the said term, lawfully entered into the said house and evicted the plaintiff therefrom.

Lessee against Lessor for Breach of a Covenant for quiet Enjoyment.

That the defendant by deed demised to the plaintiff a house, to hold for —— years from the —— day of ——, A.D. ——, at the rent thereby reserved, and subject to the covenants and conditions therein contained, and the defendant thereby covenanted with the plaintiff that he the plaintiff, his executors, administrators, and assigns, paying the yearly rent thereby reserved, and performing and observing the covenants therein contained by him and them to be performed and observed, should and lawfully might peaceably and quietly hold, use, and occupy the said house for the said term without any lawful denial, let, hindrance, molestation, or interruption whatsoever, of or by the defendant, his heirs or assigns, or any person or persons claiming through, under, or in trust for him; and all conditions were fulfilled, and all things happened, necessary to entitle the plaintiff to maintain this action for the breach hereinafter

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(*a*) Under a lease by deed, the word "*demise*" or "*let*," or any equivalent words sufficient to constitute a lease import a covenant for title, and for quiet enjoyment; unless there be an express covenant on either point, in which case no implication can be raised from such words. (*Line* v. *Stephenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 183; *Adams* v. *Gibney*, 6 Bing. 666.) But the liability on such implied covenants is confined to the lessor, and does not attach to his executor. (*Adams* v. *Gibney*, 6 Bing. 666.)

Under a parol demise the law will imply a promise for quiet enjoyment, but not for good title. (*Bandy* v. *Cartwright*, 8 Ex. 913.) A similar promise is not implied in an agreement to grant a lease (*Brashier* v. *Jackson*, 6 M. & W. 549); although in an agreement to *sell* a lease there is an implied agreement for a good title (*Souter* v. *Drake*, 5 B. & Ad. 992.) There is no implied warranty in a lease of a house or land that it is reasonably fit for habitation or cultivation. (*Sutton* v. *Temple*, 12 M. & W. 52; *Hart* v. *Windsor*, ib. 68.) Although it may be different where there is a mixed contract for letting a house and furniture. (*Smith* v. *Marrable*, 11 M. & W. 5.)

mentioned; yet after the making of the said demise, and during the said term, *G. H.* then lawfully claiming the said house through and under the defendant, and having a good title to the same and to the possession thereof through and under him, entered into the said house and evicted the plaintiff therefrom.

Like counts: Dawson v. *Dyer*, 5 B. & Ad. 584; *Carpenter* v. *Parker*, 27 L. J. C. P. 78; 3 C. B. N. S. 206; *Stanley* v. *Hayes*, 3 Q. B. 105.

For a breach of covenant for quiet enjoyment in a lease for lives: Evans v. *Vaughan*, 4 B. & C. 261.

Count for the breach of a promise of quiet enjoyment contained in a contract not under seal: Brashier v. *Jackson*, 6 M. & W. 549; *Messent* v. *Reynolds*, 3 C. B. 194; *Bandy* v. *Cartwright*, 8 Ex. 913.

Against a lessor on an agreement not under seal for not giving possession: Coe v. *Clay*, 5 Bing. 440; *Drury* v. *Macnamara*, 25 L. J. Q. B. 5; 5 E. & B. 612.

Landlord against Tenant for not giving up Possession at the Expiration of the Term.

That the defendant became and was tenant to the plaintiff of a messuage of the plaintiff upon the terms, amongst other things, that the defendant should at the determination of the said tenancy give up possession thereof to the plaintiff, and the said tenancy was duly determined; yet the defendant did not at the determination thereof give up possession of the said messuage to the plaintiff, whereby the plaintiff lost the use and profits of the said messuage, and incurred expense in recovering possession of the same.

Assignee of Lessor against Lessee (*a*).

That *G. H.*, being seised in fee of a messuage and land, let the

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(*a*) *Assignees of lessor and lessee.*]—By the common law certain covenants run with the land, so as to attach the benefit or the burden of them to the assignee of the term, but not with the reversion, so as to pass the benefit or the burden of them to the assignee of the reversion; and by the common law covenants are not assignable. (1 Wms. Saund. 240 *a*, n. (o).) Consequently the assignee of the reversion could neither sue nor be sued upon a covenant in a lease. To remedy this inconvenience the statute 32 Hen. VIII. c. 34, gave an action to and against the assignee of the reversion. By s. 1 it was enacted that all persons, being grantees or assignees of any reversion, should have like advantage against the lessee and their assigns by action for not performing conditions, covenants, or agreements expressed in the indentures of lease, as the lessors and grantors, their heirs or successors, might have had; and by s. 2, that all lessees of lands or their assigns should have like action and remedy against all persons having any gift or grant of the reversion of the lands so let, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the lessors. The statute only applies to leases by deed. (*Brydges* v. *Lewis*, 3 Q. B. 603;

same by deed to the defendant, to hold for —— years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the said *G. H.* and his assigns [*state the covenant*]; and afterwards during the said term the said *G. H.* by deed granted

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Standen v. *Chrismas*, 10 Q. B. 135; *Bickford* v. *Parson*, 5 C. B. 920.) The statute applies only to covenants which run with the land, as to which see *Spencer's Case*, 5 Co. 18 *a.*; S. C. 1 Smith's L. C. 5th ed. 43; 1 Wms. Saund. 241 *b*, n. (c); *Martyn* v. *Williams*, 1 H. & N. 817.

In an action by the lessor, where the plaintiff declares upon a demise made by himself, he is not obliged to set out any title to the lands demised, but may rely on the deed alone, (see count, *ante*, p. 173); but in an action by the assignee of the reversion the plaintiff must allege that the lessor was seised or possessed of some estate which would legally pass by assignment to the assignee (1 Wms. Saund. 233 *a.*) The omission of the allegation of title in the lessor is an informality, and would formerly have been ground for special demurrer. It may now be objected to an application under the C. L. P. Act, 1852, s. 52. (*Cuthbertson* v. *Irving*, 4 H. & N. 742, 753; 6 H. & N. 135.) The allegation of the lessor's title to the demised premises is material, and may be traversed. (*Carvick* v. *Blagrave*, 1 B. & B. 531; *Weld* v. *Baxter*, 25 L. J. Ex. 214; 26 L. J. Ex. 112; 1 H. & N. 568.)

Upon the execution of a lease by the lessee, he is estopped from denying the lessor's title, as recited in the lease. If the lessor's title is not shown in the lease the lessee is estopped from setting up any defence founded upon the fact that the lessor *nil habuit in tenementis;* and thus there arises, as between the lessor and lessee, a reversion in the lessor by estoppel. This reversion by estoppel in the lessor is *primâ facie* a reversion in fee simple which passes by descent to his heir, and by purchase to an assignee or devisee. (*Cuthbertson* v. *Irving*, 4 H. & N. 742.) The lessee may rebut the *primâ facie* presumption of the reversion being in fee simple by evidence consistent with the estoppel, as by showing that the reversion is an estate for years or for life, etc., but not by showing that the lessor had no estate at all, for this would be inconsistent with the estoppel. (*Weld* v. *Baxter*, 25 L. J. Ex. 214; 26 L. J. Ex. 112; 1 H. & N. 568.)

The heir, or assignee, or devisee of a reversion by estoppel may sue upon the covenants in the lease. (*Gouldsworth* v. *Knights*, 11 M. & W. 337; *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Doe* v. *Ongley*, 10 C. B. 25; *Spencer's Case*, 1 Smith's L. C. 5th ed. 77; *Cuthbertson* v. *Irving*, 28 L. J. Ex. 306; 29 L. J. Ex. 485; 4 H. & N. 742.) If a want of title is shown in the lease, as in a lease by a mortgagor reciting the previous mortgage, both parties are estopped from asserting a legal reversion, and the covenant is a covenant in gross and is not assignable. (*Pargeter* v. *Harris*, 7 Q. B. 708.)

The assignee of the rent reserved in a lease, without the reversion, may, upon the attornment of the tenant, maintain an action of debt for the rent (*Robins* v. *Cox*, 1 Lev. 22; *Marle* v. *Flake*, 3 Salk. 118); and it has been held that since the statute 4 Anne, c. 16, s. 9, which renders attornment unnecessary, such action is maintainable without attornment) (*Allen* v. *Bryan*, 5 B. & C. 512; *Williams* v. *Hayward*, 28 L. J. Q. B. 374); where a termor underleases for a longer period than his term, reserving a rent, the rent is assignable, and the assignee may sue for arrears. (*Williams* v. *Hayward*, *supra.*)

Where the reversion consists of a term of years and it is assigned to the reversioner in fee, the reversion of the term merges in the reversion in fee, and at common law all the incidents and obligations of the reversion were extinguished and lost. (*Webb* v. *Russell*, 3 T. R. 393.) But now, by the Act to Amend the Law of Real Property, 8 & 9 Vict. c. 106, s. 9, it is enacted that when the reversion expectant on a lease, of any tenements or

to the plaintiff all his reversion of and in the said messuage and land; and afterwards during the said term the defendant [*state the breach*].

Count by assignee of part of the demised premises against lessee: Twynam v. *Pickard*, 2 B. & Ald. 105; *by assignee of lessor being a termor against lessee: Carvick* v. *Blagrave*, 1 B. & B. 531; *Webb* v. *Russell*, 3 T. R. 393; *by assignee of lessor, being tenant for life in right of his wife, against lessee: Phelps* v. *Prew*, 3 E. & B. 430; *by assignee of land against a lessee of an easement in the land upon a covenant in the lease: Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J. Ex. 117.

Executor or Administrator of Lessor possessed of a Term against Lessee (*a*).

(*Commence with one of the forms, ante, pp.* 12, 14.)—That the said *C. D.* being possessed of a messuage for the residue of a term of —— years, commencing the —— day of ——, A.D. —— (*b*), let the

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hereditaments, of any tenure, shall be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease. (And see *Spencer's Case*, 1 Smith's L. C. 5th ed. 52.)

Where a party is pleading his own title derived by assignment, he must deduce it step by step through the various mesne assignments, it being matter within his own knowledge; but a party alleging title by assignment in his adversary (where the same reason does not apply) may plead it by a *que estate*, that is, by a general averment that the estate precedently laid in some other person vested in him by assignment. (*Harris* v. *Beavan*, 4 Bing. 646; *Derisley* v. *Custance*, 4 T. R. 75; Steph. Pl. 6th ed. pp. 230–251.) This rule is not affected by the alterations in pleading introduced by the C. L. P. Acts; and the course sometimes adopted in practice of a party pleading his own title by assignment generally is improper, and also inexpedient, as it obliges the other party to traverse the whole title, instead of traversing only so much as may really be in dispute.

(*a*) Covenants which run with the land, as covenants to repair, etc., pass with the reversion to the heir or devisee, and not to the executor, unless the reversion passes to the executor as being of a term only. The executor therefore cannot, in general, sue upon covenants running with the land. But in respect of damages caused to the personal estate of the testator exclusively by breaches of such covenants in his lifetime, and apart from the damages to the real estate, the executor may sue. (*Kingdon* v. *Nottle*, 1 M. & S. 355; *Jones* v. *King*, 4 M. & S. 188; 5 Taunt. 418; *Raymond* v. *Fitch*, 2 C. M. & R. 588; *Ricketts* v. *Weaver*, 12 M. & W. 718.) An executor can sue for rent accrued due to the testator, seised in fee or for life, in his lifetime by virtue of 32 Hen. VIII. c. 37. And by 11 Geo. II. c. 19, s. 15, the executor of a tenant for life may sue for a proportion of the rent up to the time of his death, unless the lease was made under a power.

(*b*) Where the particulars of the lessor's estate are not known, the following general form of averment may be used:—"That the said *C. D.* being possessed of a messuage for a term more than sufficient to enable him to make the lease hereinafter mentioned." (See *Dollen* v. *Batt*, 27 L. J. C. P. 281; 4 C. B. N. S. 760.)

same by deed to the defendant to hold for —— years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the said *C. D.* [*state the covenant*]; and afterwards during the last-mentioned term, and in the lifetime of the said *C. D.*, the defendant [*state such breaches as occurred in the lifetime of the deceased*], and afterwards during the last-mentioned term, and after the death of the said *C. D.*, the defendant [*state such breaches as occurred after the death*].

Like counts: Raymond v. *Fitch*, 2 C. M. & R. 588; *Baker* v. *Gostling*, 1 Bing. N. C. 19; *Ricketts* v. *Weaver*, 12 M. & W. 718; *Martyn* v. *Clue*, 22 L. J. Q. B. 147.

By executor of assignee of lessor against lessee: Dollen v. *Batt*, 27 L. J. C. P. 281; 4 C. B. N. S. 760.

Heir of Lessor against Lessee.

That *G. H.* being seised in fee of a messuage let the same by deed to the defendant, to hold for —— years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the said *G. H.* and his heirs [*state the covenant*]; and afterwards during the said term the said *G. H.* died, and thereupon the reversion in fee of and in the said messuage descended to the plaintiff as eldest son and heir of the said *G. H.*; and afterwards during the said term, and whilst the plaintiff was seised of the said reversion, the defendant [*state the breach*].

A like count: Alderman v. *Neate*, 4 M. & W. 704.

Devisee of Lessor against Lessee.

That *G. H.* being seised in fee of a messuage, let the same by deed to the defendant, to hold for —— years from the —— day of ——, A.D. ——, and the defendant by the said deed covenanted with the said *G. H.* and his assigns, [*state the covenant*]; and afterwards during the said term the said *G. H.* died, having made his last will and thereby devised all his reversion in the said messuage to the plaintiff; and afterwards, during the said term, and whilst the plaintiff was seized of the said reversion, the defendant [*state the breach*].

Like counts: Weld v. *Baxter*, 25 L. J. Ex. 214; 26 L. J. Ex. 112; *Wootton* v. *Steffenoni*, 12 M. & W. 129.

By the devisee of the lessor against the administrator of the lessee: Vyvyan v. *Arthur*, 1 B. & C. 410.

Count by the heir of the devisee of the lessor of part of the demised premises against the lessee: Aldridge v. *Howard*, 4 M. & G. 921.

By the grantee of the devisee of the lessor against the lessee: Ackland v. *Pring*, 2 M. & G. 937.

Legatee of Lessor against Lessee.

That *G. H.* being possessed of a messuage for the residue of a term of —— years, commencing the —— day of ——, A.D. ——, let the same by deed to the defendant, to hold for —— years from the

—— day of ——, A.D. ——, and the defendant by the said deed covenanted with the said *G. H.* and his executors and assigns [*state the covenant*]; and afterwards during the last-mentioned term the said *G. H.* died, having made his last will and thereby bequeathed all his reversion in the said messuage to the plaintiff, and appointed *K. L.* executor of his said will, and the said *K. L.*, as such executor as aforesaid, duly proved the said will and assented to the said bequest; and afterwards during the last-mentioned term, and whilst the plaintiff was possessed of the said reversion, the defendant [*state the breach*].

Count by a remainder-man upon a Lease made by a Tenant for Life under a Power of leasing in a Will (*a*).

That *G. H.*, being seised in fee of a messuage and land, devised the same by his last will to the use of *J. K.* during the life of the said *J. K.*, and from and after his decease to the use of the plaintiff in fee, and the said *G. H.* by his said will gave to the said *J. K.*, when he should be such tenant for life as aforesaid, power to demise the said messuage and land, at rack-rent, for any term of years absolute, not exceeding twenty-one years, to take effect in possession [*according to the terms of the power*]; and the said *G. H.* afterwards died so seised as aforesaid without having altered his said will, and afterwards the said *J. K.*, whilst he was such tenant for life of the said messuage and land as aforesaid, by deed made in pursuance and by virtue of the said power demised to the defendant the said messuage and land at a certain rent, being a rack-rent for the same, to hold for the term of —— years absolute from the —— day of ——, A.D. ——, to take effect in possession [*showing a strict compliance with the terms of the power*], and the defendant by the said deed covenanted with the said *J. K.*, [*here state the covenant broken*]; and after the making of the said demise and during the said term, the said *J. K.* died, and the plaintiff became seised in fee of the reversion of and in the said messuage and land immediately expectant on the determination of the said term; and afterwards during the said term the defendant [*here state the breach of the covenant*].

Like count: Isherwood v. *Oldknow*, 3 M. &, S. 382; *and see Rogers* v. *Humphreys*, 4 A. &. E. 299.

Like count on a lease under a power contained in a marriage settlement: Yellowly v. *Gower*, 24 L. J. Ex. 289; 11 Ex. 293.

Lessor against Assignee of Lessee upon a Covenant in the Lease (*b*).

(*Venue local.*) That the plaintiff by deed let to *G. H.* a messuage, to hold for —— years from the —— day of ——, A.D. ——,

(*a*) This form may be adapted to frame declarations on covenants in leases made under the Act to Facilitate Leases of Settled Estates, 19 & 20 Vict. c. 120.

(*b*) This count is sufficient against any person in whom the estate becomes so vested as to render him liable on the covenants; as the executor or administrator of the lessee (*Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Buckworth* v. *Simpson*, 1 C. M. & R. 834; *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Johnson* v. *Gibson*, 1 E. & B. 415); or the assignee of the

and the said *G. H.*, by the said deed, for himself and his assigns, covenanted with the plaintiff [*state the covenant*]; and afterwards during the said term all the estate of the said *G. H.* in the said messuage vested in the defendant by assignment; and afterwards during the said term the defendant [*state the breach*].

Like count against the assignee of part of the demised premises: Wollaston v. *Hakewill*, 3 M. & G. 297; *Curtis* v. *Spitty*, 1 Bing. N. C. 756.

Count for rent against the assignee of an estate in fee subject to a rent-charge: Harden v. *Hesketh*, 28 L. J. Ex. 137; 4 H. & N. 175.

Lessor against Executor or Administrator of Lessee (*a*).

[*Commence with one of the forms, ante*, pp. 13, 15.] That the plaintiff by deed let to the said *G. H.* a messuage, to hold for —— years, from the —— day of ——, A.D. ——, and the said *G. H.* by the said deed covenanted with the plaintiff [*state the covenant*]; and afterwards during the said term and in the lifetime of the said *G. H.* the said *G. H.* [*state such breach as occurred in the lifetime of the deceased*], and afterwards during the said term and after the death

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lease by way of mortgage (*Williams* v. *Bosanquet*, 1 B. & B. 238); or the assignees of a bankrupt lessee (*Goodwin* v. *Noble*, 27 L. J. Q. B. 204); or churchwardens and overseers in whom the term has vested under 59 Geo. III. c. 12, s. 17. (*Alderman* v. *Neate*, 4 M. & W. 704; and see *ante*, p. 179 *n.*)

The venue in this action is local, because the cause of action against the defendant arises from the fact of the covenant running with the land, that is to say, from the privity of estate, and not from any privity of contract between the lessor and the defendant. The rules regulating the venue in this and the following actions are thus concisely stated in the note to *Mostyn* v. *Fabrigas*, 1 Smith's L. C. 5th ed. 607:—"The result of the statute 34 Hen. VIII. c. 34, coupled with the common law, is that the following actions, viz. lessor against lessee, lessee against lessor, assignee of reversion against lessee, lessee against assignee of reversion, are *transitory;* while the following, viz. lessor against assignee of lessee, assignee of lessee against lessor, assignee of lessee against assignee of lessor, and assignee of lessor against assignee of lessee are *local.*" They are all comprised in the general proposition, that wherever an assignee of the lessee is plaintiff or defendant, the action for breach of covenant is local; in other cases it is transitory.

(*a*) In actions by the landlord against the executor of the deceased tenant for rent accrued due during the life of the tenant the executor is liable *de bonis testatoris*, and the action must be brought against him in his representative character. For rent accrued due after the death of the tenant, the executor may be charged *de bonis testatoris*, and sued in his representative character; but he is also *primâ facie* liable *de bonis propriis* as assignee of the term, and may be so sued. (*Wollaston* v. *Hakewill*, 3 M. & G. 297, 321; *Johnson* v. *Gibson*, 1 E. & B. 415.) The term vests in the executor by operation of law without entry. (*Nation* v. *Tozer*, 1 C. M. & R. 172; *Wollaston* v. *Hakewill*, 3 M. & G. 297; Wms. Ex. 5th ed. 1588.) The executor, as assignee of the term, is however only personally liable in respect of the perception of profits, which are special assets appropriated to satisfy the rent of the landlord. (*Hopwood* v. *Whaley*, 6 C.

of the said *G. H.* the defendant [*state such breach as occurred after the death*].

Against executor of deceased lessee in his representative character upon a covenant to pay rent: Ackland v. *Pring*, 2 M. & G. 937; *and see Hopwood* v. *Whaley*, 6 C. B. 744; *against executor of deceased tenant, charging him personally as assignee of the term for rent: Hornidge* v. *Wilson*, 11 A. & E. 645; *Wollaston* v. *Hakewill*, 3 M. & G. 297; *Rubery* v. *Stevens*, 4 B. & Ad. 241; *Johnson* v. *Gibson*, 1 E. & B. 415.

Like counts on a covenant to repair: Perry v. *Watts*, 3 M. & G. 775; *Penley* v. *Watts*, 7 M. & W. 601.

Lessee against Assignee of Lessor (a).

That *G. H.* by deed let to the plaintiff a messuage, to hold for —— years from the —— day of ——, A.D. ——, and by the said deed the said *G. H.* for himself and his assigns covenanted with the plaintiff [*state the covenant*]; and afterwards during the said term all the reversion of the said *G. H.* in the said messuage vested in the defendant by assignment; and afterwards during the said term, the defendant [*state the breach*].

Like counts: Sturgeon v. *Wingfield*, 15 M. & W. 224; *Flight* v. *Glossopp*, 2 Bing. N. C. 125.

Against executor of lessor for breach of covenant for quiet enjoyment: Adams v. *Gibney*, 6 Bing. 656.

Assignee, Executor, Legatee, etc., of Lessee against Lessor.

Counts by the assignee, executor, legatee, etc., of the lessee may be framed from the above precedents, stating the mode of assignment adapted to each case. The venue in such actions is local.

B. 756.) Therefore the executor, when sued as assignee, may relieve himself from the personal liability by pleading that he is assignee only as executor, and that the premises are of no value, or are of less value than the rent, etc. (See *post*, *Pleas*, "*Executors*," ch. 5; and see Wms. Exs. 5th ed. 1587, 1588.)

As to breaches of covenant, the executor of the tenant is, in general, liable *de bonis testatoris*, for all breaches of covenant in the lifetime or after the death of the testator. (Wms. Exs. 5th ed. 1583; *Wollaston* v. *Hakewill*, 3 M. & G. 320; *Wilson* v. *Wigg*, 10 East, 313.) And it seems that with respect to breaches of covenant after the death of the testator, the executor is liable *de bonis propriis* as assignee of the term, except that with respect to covenants to pay rent his liability does not exceed what the property yields. (*Tremeere* v. *Morison*, 1 Bing. N. C. 89.)

By the statute 22 & 23 Vict. c. 35, s. 27, it is provided, that where an executor, after satisfying all present liabilities under a lease of the testator, and setting apart a sufficient sum to answer any future claim in respect of any fixed and ascertained sum under the lease, has assigned the lease to a purchaser, he shall no longer be liable in respect of any subsequent claim under the lease. (See *Dodson* v. *Samwell*, 30 L. J. C. 799.)

(*a*) This count is sufficient against the heir of the lessor, or any person to whom the reversion passes, so as to render him liable on the covenants. (*Derisley* v. *Custance*, 4 T. R. 75; and see *ante*, p. 179 *n.*)

Counts by assignee of lessee against lessor for breach of covenant of quiet enjoyment: Brookes v. *Humphreys*, 5 Bing. N. C. 55.

By assignee of lessee against lessor for breach of a covenant to supply the premises with water: Jourdain v. *Wilson*, 4 B. & Ald. 266.

Assignee of Lessor against Assignee of Lessee.

(*Venue local.*) That *G. H.*, being seised in fee of a messuage, let the same by deed to *I. K.*, to hold for —— years from the —— day of ——, A.D. ——, and by the said deed, the said *I. K.* for himself and his assigns, covenanted with the said *G. H.* and his assigns [*state the covenant*]; and afterwards during the said term the said *G. H.* by deed granted to the plaintiff all the reversion of the said *G. H.* in the said messuage, and all the estate of the said *I. K.* in the said messuage vested in the defendant by assignment; and afterwards during the said term the defendant [*state the breach*].

Like counts: Harris v. *Beavan*, 4 Bing. 646; *Harley* v. *King*, 2 C. M. & R. 18; *Minshull* v. *Oakes*, 27 L. J. Ex, 194.

By assignee of lessor against executor or administrator of lessee: Perry v. *Watts*, 3 M. & G. 775; *Badely* v. *Vigurs*, 4 E. & B. 71.

Count by executor of lessor against executor of lessee: Penley v. *Watts*, 7 M. & W. 601.

By Assignee of Lessee against Assignee of Lessor.

[*Venue local.*] That *G. H.* let by deed to *J. K.* a messuage, to hold for —— years from the —— day of ——, A.D. ——, and by the said deed the said *G. H.* for himself and his assigns covenanted with the said *J. K.* and his assigns [*state the covenant*]; and afterwards during the said term the said *J. K.* by deed assigned all his estate in the said messuage to the plaintiff, and all the reversion of the said *G. H.* in the said messuage vested in the defendant by assignment; and afterwards during the said term the defendant [*state the breach*].

Assignee of Lessor, a termor, against Assignee of Lessee, showing several mesne Assignments.

That *G. H.* being possessed of a messuage with the appurtenances for the residue of a term of —— years, commencing on the —— day of ——, A.D. ——, let the same by deed bearing date the —— day of ——, A.D. ——, to *J. K.* and his assigns, to hold for —— years from the —— day of ——, A.D. ——, at the yearly rent of £——, payable [half yearly] on the —— day of ——, and the —— day of ——, in every year during the last-mentioned term; and by the said deed the said *J. K.* for himself and his assigns, covenanted with the said *G. H.* and his assigns, that he, the said *J. K.* or his assigns, would pay to the said *G. H.* or his assigns the said yearly rent [half yearly] as aforesaid; and afterwards during the last-mentioned term the said *G. H.* died, having made his last will and appointed *L. M.* and *N. O.* executors thereof, and the said *L. M.* and *N. O.* as such executors as aforesaid afterwards duly proved the said will, and thereupon being possessed as such executors as aforesaid of the reversion which was of the said

G. H. of and in the said messuage with the appurtenances by deed bearing date the —— day of ——, A.D. ——, assigned the said reversion to *P. Q.* and his assigns, and afterwards during the last-mentioned term the said *P. Q.* by deed bearing date the —— day of A.D. ——, assigned the said reversion to *R. S.* and his assigns, and afterwards during the last-mentioned term the said *R. S.* died, having made his last will and thereby bequeathed the said reversion to *T. U.* and appointed him executor of his said will, and the said *T. U.* duly proved the said will and assented to the said bequest and thereupon being possessed of the said reversion which was of the said *R. S.*, of and in the said messuage with the appurtenances, the said *T. U.* by deed bearing date the —— day of ——, A.D.——, assigned the said reversion to the plaintiff; and all the estate of the said *J. K.* in the said messuage with the appurtenances under and by virtue of the first-mentioned deed during the said term thereby granted, vested in the defendant by assignment; and afterwards £—— of the said rent for —— years [and a half of another year] of the said term granted by the first-mentioned deed, and which period of —— years [and a half of another year] had wholly elapsed after the said assignment of the said reversion to the plaintiff and the said assignment of the last-mentioned term to the defendant, became and still is due in arrear and unpaid to the plaintiff.

See various forms for framing statements of title: 2 Chit. Pl. 7th ed. 403.

Count for Double Value under 4 *Geo. II. c.* 28, *s.* 1 (*a*).

That the defendant was the tenant to the plaintiff of a messuage and land of the plaintiff for a term of years [*or* as tenant from year to year], and wilfully held over the said messuage and land after the determination of the said term, and after demand made and notice in writing given to the defendant by the plaintiff, as and being the defendant's landlord as aforesaid and the person to whom the reversion of the said messuage and lands then belonged, for delivering the possession thereof to the plaintiff, and kept the plaintiff, then being entitled to the possession thereof, out of the possession of the said messuage and land during the period of —— months after the determination of the said term, and after such demand made and such notice given

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(*a*) By the statute 4 Geo. II. c. 28, s. 1, it is enacted, "that in case any tenant or tenants for any term of life, lives or years, or other person or persons, who are or shall come into possession of any lands, tenements, or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized; then and in such case such person or persons so holding over shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of His Majesty's Courts

as aforesaid; whereby and by virtue of the statute in such case made and provided, the defendant became liable to pay to the plaintiff £——, as and being at the rate of double the yearly value of the said messuage and lands for and during the last-mentioned period.

Like counts: Poole v. *Warren*, 8 A. & E. 582; *Blatchford* v. *Cole*, 28 L. J. C. P. 140; 5 C. B. N. S. 514; *Swinfen* v. *Bacon*, 30 L. J. Ex. 33; 368; 6 H. & N. 184; 846.

A like count by tenants in common: Wilkinson v. *Hall*, 1 Bing. N. C. 713.

Count for Double Rent under 11 *Geo. II. c.* 19, *s.* 18 (*a*).

That the defendant was the tenant to the plaintiff of a messuage and land, as tenant from year to year, at the yearly rent of £——, payable quarterly, and the defendant gave the plaintiff notice of his the defendant's intention to quit the said premises at a time mentioned in such notice, and the defendant did not accordingly deliver

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of Record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity."

The double value given by this statute is in the nature of a penalty given to the party grieved, and therefore must be sued for within two years, see *post*, c. 5, "Limitation." The holding over must be wilful and contumacious, and not either by mistake or under a *bonâ fide* claim of right. (*Soulsby* v. *Nering*, 9 East, 310; *Swinfen* v. *Bacon*, 30 L. J. Ex. 33, 368; 6 H. & N. 184, 846.) A person to whom the landlord has granted a fresh lease, to commence at the expiration of the defendant's term, is not a person entitled to the possession within the meaning of the Act, and cannot maintain this action. (*Blatchford* v. *Cole*, 5 C. B. N. S. 514; 28 L. J. C. P. 140.)

A landlord may also sue his tenant for the special damage occasioned by the tenant holding over after the expiration of the tenancy, as for the damages which he is rendered liable to pay to a third party to whom he has let the premises, and is unable to give possession in consequence of the tenant holding over. (*Bramley* v. *Chesterton*, 27 L. J. C. P. 23; 2 C. B. N. S. 592.)

The action for double value is within the jurisdiction of the county court. (*Wickham* v. *Lee*, 12 Q. B. 521.)

(*a*) By the 11 Geo. II. c. 19, s. 18, it is enacted, "that in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, or them holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same time, and in the same manner, as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

The double rent given by this statute is not in the nature of a penalty like the double value under the statute 4 Geo. II. c. 28, but may be levied, sued for, and recovered, in the same manner as the single rent. The statute applies only where the tenant had the power of determining his tenancy by a notice, and has given a valid notice sufficient to determine it. (*Johnstone* v. *Hudlestone*, 4 B. & C. 922.)

up the possession thereof at the time in such notice contained, but continued in possession thereof for a long time afterwards; whereby and by force of the statute in such case made and provided the defendant became liable to pay to the plaintiff for the last-mentioned time double the rent which he should otherwise have paid for the said messuage and land, of which double rent £—— for —— quarters are due and unpaid.

See a claim for double rent pleaded in an avowry: Johnstone v. *Hudlestone*, 4 B. & C. 922; *Humberstone* v. *Dubois*, 10 M. & W. 765.

Other counts relating to landlord and tenants, see "*Crops*," p. 126; "*Indemnities*," p. 153; "*Waste*," ch. 3.

Limitation, Statutes of (*a*).

Liquidated Damages (*b*).

On a Covenant in a Deed of Sale of a Business, to pay liquidated damages, in the event of Defendant carrying on the Business.

That by a deed bearing date the —— day of ——, A.D. ——, made between the plaintiff and the defendant, the defendant assigned to the plaintiff all the interest, benefit, and profit, to be thenceforth made from the profession or practice of a surgeon and apothecary as theretofore carried on by the defendant at ——, or from any of

(*a*) A promise to pay a simple contract debt against which the period of limitation has run revives the debt from the date of the promise. The promise may be absolute or conditional; and in the latter case the debt is not revived until the performance of the condition. Where the promise is absolute the declaration is framed upon the original debt. Where the promise is conditional the declaration may be framed upon such conditional promise, and must then aver the performance of the condition and all the matters of fact necessary to show that the debt is revived absolutely, (as in *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Waters* v. *Thanet*, 2 Q. B. 757;) but it is also sufficient to charge the original debt as absolute in the declaration, leaving its absolute renewal to be proved by the evidence, (*Hart* v. *Prendergast*, 14 M. & W. 741, 746;) and the latter mode of framing the declaration is more generally adopted; and see *post*, c. 5, *Limitation*.

(*b*) *Liquidated damages* are the sum agreed upon in the contract by the parties themselves as the damages for a breach of it.

A penalty is a sum named in the contract to be forfeited on a breach, not as an agreed valuation of the damages, but as a security for the due performance of the contract, (per *Lord Mansfield*, *Lowe* v. *Peers*, 4 Burr. 2225, 2229; *Kemble* v. *Farren*, 6 Bing. 141, 148.)

Whether a sum named in a contract to be paid upon a breach is liquidated damages or a penalty depends upon the construction of the contract; and certain rules have been laid down for the construction of contracts in this respect. (See *Astley* v. *Weldon*, 2 B. & P. 346; *Kemble* v. *Farren*, 6 Bing. 140; *Atkyns* v. *Kinnier*, 4 Ex. 776; *Reynolds* v. *Bridge*, 26 L. J. Q. B. 12; *Sparrow* v. *Paris*, 31 L. J. Ex. 137.)

Upon the breach of a contract secured by a penalty the plaintiff may

the patients belonging thereto; and by the said deed the defendant covenanted with the plaintiff, that the defendant would not at any time afterwards directly or indirectly, by himself or in co-partnership with any other person or persons, carry on or exercise the practice or profession of a surgeon and apothecary, or either of them, either by residing or visiting any patient within the distance of three miles from the then place of business of the defendant, at —— aforesaid; and that, in case of any breach of the last-mentioned covenant, the defendant would pay to the plaintiff the sum of £——, to be recovered against him as and for liquidated damages, and not as a penalty; and the defendant afterwards carried on and exercised the practice or profession of a surgeon and apothecary, within three miles of —— aforesaid, by visiting, within the said distance from that place, *G. H.*, a patient of the defendant, in his character, practice, and profession of a surgeon and apothecary; yet the defendant has not paid to the plaintiff the said sum of £——.

Like counts: Rawlinson v. *Clarke*, 14 M. & W. 187; *Green* v. *Price*, 13 M. & W. 695; *Mallan* v. *May*, 11 M. & W. 653; *Hitchcock* v. *Coker*, 6 A. & E. 438; *Mercer* v. *Irving*, 27 L. J. Q. B. 291; *Reynolds* v. *Bridge*, 26 L. J. Q. B. 16.

Count on a contract for the services of the defendant as a commercial traveller, stipulating that if he travelled over the same ground for any other person he should pay the plaintiff a stated sum: Mumford v. *Gething*, 7 C. B. N. S. 305.

Count on a covenant in a deed of dissolution of partnership between attornies to pay liquidated damages in case he should continue to practice contrary to the covenant: Galsworthy v. *Strutt*, 1 Ex. 659.

Count on an agreement providing for the dissolution of partnership as stage coach proprietors with a stipulation that the defendant should not run a coach within certain hours or should pay liquidated damages: Leighton v. *Wales*, 3 M. & W. 545.

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either sue for the penalty—assigning the breach, in which case he can recover the damage actually sustained, not exceeding the amount of the penalty—or he may sue for unliquidated damages for the breach, to be assessed by the jury irrespective of the penalty. In the former case the recovery of the full penalty will be a satisfaction for all breaches of the contract, but in the latter the plaintiff may sue *toties quoties* there are breaches, and recover a full indemnity (see 8 & 9 Will. 3. c. 11. ante p. 97; per *Lord Mansfield*, *Lowe* v. *Peers*, 2 Burr. 2225, 2228; *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343; *Astley* v. *Weldon*, 2 B. & P. 346; 1 Wms. Saund. 58; per *Bramwell, B.*, *Betts* v. *Burch*, 4 H. & N. 506, 510; 28 L. J. Ex. 267, 269.)

Where the plaintiff sues for liquidated damages the non-payment of the damages must be assigned as a breach of the contract, otherwise the count will be taken as claiming unliquidated damages, and the jury may assess a smaller sum (*Hurst* v. *Hurst*, 4 Ex. 571); where the contract is alternative, either to do a thing or to pay a liquidated sum, the breach must negative both the alternatives. (*Leigh* v. *Lillie*, 30 L. J. Ex. 25; 6 H. & N. 165; explaining *Hurst* v. *Hurst*, *supra*.)

The plaintiff cannot sue for the liquidated damages payable on a breach of the contract and also claim an injunction to restrain the breach; but he may sue for unliquidated damages for a breach and also claim an injunction. (*Carnes* v. *Nesbitt*, 30 L. J. Ex. 348.)

Count on a covenant in a lease to pay a certain sum as increased rent for every acre converted into tillage: Farrant v. *Olmius*, 3 B. & Ald. 692; *Aldridge* v. *Howard*, 4 M. & G. 921.

Count on a covenant in a lease not to lop trees under a penalty for each tree so lopped over and above the value of the tree: Hurst v. *Hurst*, 4 Ex. 571.

Count on a covenant in a lease not to sell or carry away manure under an increased rent for every ton so sold or carried away: Leigh v. *Lillie*, 30 L. J. Ex. 25; 6 H. & N. 165.

Count on a promise, in consideration of the plaintiff loading goods on defendant's ship, that the ship should sail with or before any other ship under forfeiture of half the freight, for breach in non-payment: Sparrow v. *Paris*, 31 L. J. Ex. 137.

Mandamus.

See *post*, "*Mandamus*," ch. 3.

Marriage.

See "*Husband and Wife*," *ante*, p. 146.

For Breach of a Promise to Marry within a reasonable Time. (*C. L. P. Act*, 1852, *Sch. B.* 19.) (*a*)

That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff

(*a*) Mutual promises to marry are not agreements made upon consideration of marriage within the Statute of Frauds, 29 Car. II. c. 3, s. 4, and need not be proved by writing (*Harrison* v. *Cage*, 1 L. Raym. 386); but promises to pay money in consideration of marriage are, and must be proved by writing (see *Shadwell* v. *Shadwell*, 30 L. J. C. P. 145; 9 C. B. N. S. 159.) A general promise to marry, without any express stipulation as to time, is a promise to marry within a reasonable time. (*Harrison* v. *Cage*, 1 L. Raym. 386; and see *Short* v. *Stone*, 8 Q. B. 358.) A promise to marry made by a person who was already married at the time of making the promise but of which the promisee had no notice, is binding, and an action may be maintained upon it. (*Wild* v. *Harris*, 7 C. B. 999; *Milward* v. *Littlewood*, 5 Ex. 775.)

The marriage of one of the promising parties to a third party after the promise, though before the time for performance has elapsed, is a breach of the contract, and entitles the other party at once to bring an action. (*Short* v. *Stone*, 8 Q. B. 358; *Caines* v. *Smith*, 15 M. & W. 189.)

An executor or administrator cannot sue for a breach of promise of marriage made to the testator or intestate, except perhaps in respect of special damage caused to the estate by the breach of contract. (*Chamberlain* v. *Williamson*, 2 M. & S. 408.)

In this action the jury may give damages for the injury to the feelings of

has always been ready and willing to marry the defendant; yet the defendant has neglected and refused to marry the plaintiff.

For Breach of a Promise to Marry on a particular Day.
(C. L. P. Act, 1852, Sch. B. 20.)

That the plaintiff and the defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day; yet the defendant neglected and refused to marry the plaintiff.

For Breach of a Promise to Marry where the Defendant has married another Person.

That the plaintiff and defendant agreed to marry one another, and the plaintiff was always ready and willing to marry the defendant until the breach of the said agreement hereinafter mentioned; yet the defendant, after the said agreement, married another person.

Like counts: Caines v. *Smith*, 15 M. & W. 189; *Short* v. *Stone*, 8 Q. B. 358.

For Breach of a Promise to Marry, subject to the consent of another Person.

That the plaintiff and defendant agreed to marry one another upon condition that *G. H.* would consent to the said marriage; and the said *G. H.* consented to the said marriage, whereof the defendant had notice, and a reasonable time for such marriage afterwards elapsed, and the plaintiff has always been ready and willing to marry the defendant; yet the defendant has neglected and refused to marry the plaintiff.

On a Promise to Pay a Sum of Money in consideration of the Plaintiff marrying a particular Person.

That in consideration that the plaintiff would marry *G. H.*, the defendant promised the plaintiff to pay him £—— whenever such marriage should have taken place; and the plaintiff afterwards married the said *G. H.*, whereof the defendant had notice; yet the defendant has not paid the said £—— to the plaintiff.

Master and Servant (*a*).

the plaintiff, as well as for the loss of the marriage. (Sedgwick on Damages, 2nd ed. p. 208; per Willes J., *Smith* v. *Woodfine*, 1 C. B. N. S. 660, 668; where see further as to the measure of damages, and what may be given in evidence in aggravation and mitigation.)

In this action the parties to the action are still not competent as witnesses. (See 14 & 15 Vict. c. 99, s. 4.) The county court has no jurisdiction in any action for breach of promise of marriage. (9 & 10 Vict. c. 95, s. 58.)

(*a*) The indebitatus count is the appropriate form of action for the

Indebitatus Count by Servant against Master for Wages.

Money payable by the defendant to the plaintiff for the work and services of the plaintiff, by him done and rendered, as the hired servant of and for the defendant, and otherwise for the defendant, and at his request, and for wages due from the defendant to the plaintiff in respect thereof.

By a Servant against his Master for refusing to receive him into his Service according to Agreement.

That in consideration that the plaintiff would enter into the service of the defendant, and serve him for [one year] from the ——

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recovery of wages due for work done under a contract of service. The common count for work would be sufficient, *ante* 32 n. (*b*). Where the cause of action is a wrongful dismissal, whereby the plaintiff has been prevented from earning wages, the indebitatus count is inappropriate, and the plaintiff must declare specially. (*Smith* v. *Hayward*, 7 A. & E. 544; *Broxham* v. *Wagstaffe*, Ex. 5 Jur. 845; *Fewings* v. *Tisdal*, 1 Ex. 295.) Even in the case of domestic servants, the month's wages to be paid upon dismissal without warning are not claimable as wages, but only as compensation for dismissal, and are therefore not recoverable under the indebitatus count for wages. (*Fewings* v. *Tisdal*, 1 Ex. 295.) An indebitatus count might, perhaps, be framed to recover them as a debt due under the contract upon the dismissal. (*East Anglian Ry. Co.* v. *Lythgoe*, 2 L. M. & P. 221, 226.) So where the contract has been rescinded (*Lamburn* v. *Cruden*, 2 M. & G. 253), or where a servant has been dismissed (*Turner* v. *Robinson*, 5 B. & A. 789) after a certain period of service, but before any wages have accrued due under the contract, the plaintiff cannot recover for the services rendered, unless a new agreement to pay for such services can be established. (*De Bernardy* v. *Harding*, 8 Ex. 822; and see *ante*, p. 33.)

In special counts the contract of service must be correctly described, with all the qualifications and exceptions to which it is subject, otherwise there will be a variance at the trial, under the plea of non assumpsit, which will be fatal, if not amended. Thus, where the count alleged a contract of service for one year, and it appeared in evidence to be determinable by three months' notice, the defendant, under the plea of non assumpsit, was held entitled to a verdict (*Metzner* v. *Bolton*, 9 Ex. 518); where the count alleged a contract of service from a certain day until determined by reasonable notice on either side, and the contract proved was a hiring from year to year, it was held a fatal variance. (*Lilley* v. *Elwin*, 11 Q. B. 742.)

A contract of service for an indefinite time is generally presumed, as a matter of fact, to be a contract for a year; but there is no inflexible rule of law to that effect. (*Beeston* v. *Collyer*, 4 Bing. 309; *Baxter* v. *Nurse*, 6 M. & G. 935; *Fairman* v. *Oakford*, 29 L. J. Ex. 459; 5 H. & N. 635.)

In the hiring of domestic servants there is a custom, presumptively forming part of the contract, that the servant may be dismissed with a month's warning or a month's wages (*Nowlan* v. *Ablett*, 2 C. M. & R. 54); so in engagements of service in particular trades and businesses, the custom in the trade or business to determine the contract by notice is incorporated into the contract, unless the terms of the contract expressly or impliedly exclude the custom. (*Parker* v. *Ibbetson*, 27 L. J. C. P. 236; 4 C. B. N. S. 346.)

Where there is a contract of hiring for a year, and the parties continue the service at the expiration of the year, without further agreement expressly made, it is evidence of a new contract, for a year, on the same terms. (*Beeston* v. *Collyer*, 4 Bing. 309.) Under such circumstances it

day of ——, A.D. ——, in the capacity of [clerk] to the defendant, at the wages of £—— a year, the defendant promised the plaintiff to receive the plaintiff into his said service and to retain him therein for the period and on the terms aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be received and retained by the defendant in his said service in the capacity and on the terms aforesaid; yet the defendant did not nor would receive the plaintiff into his said service and retain him therein for the period and on the terms aforesaid.

Like counts: Leroux v. *Brown*, 12 C. B. 801; *Hochster* v. *Delatour*, 2 E. & B. 678.

Count for not receiving into Service, with Statement of Damage.

That it was agreed by and between the plaintiff and the defendant that the plaintiff should enter into and continue in the service of the defendant, and that he should receive and retain the plaintiff in such service, in the capacity of [governess to the children of the defendant], until the expiration of a reasonable notice to be given by either of them to the other to determine such service, at a salary at the rate of £—— a year to be paid by the defendant to the plaintiff in that behalf; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to be received and retained by the defendant in his said service in the capacity and on the terms aforesaid; yet the defendant did not nor would receive the plaintiff into his said service in the capacity and on the terms aforesaid; whereby the plaintiff lost the profits and emoluments which would have accrued to the plaintiff from being received into and retained in the said service of the defendant as aforesaid, and was also deprived of the opportunity of being retained and employed by any other person, and remained out of service and unemployed for a long time, and lost the benefit of divers expenses which the plaintiff necessarily incurred in and about entering into and preparing to perform the said agreement on the plaintiff's part.

By a Servant against his Master on a Yearly Hiring for a wrongful Dismissal.

That in consideration that the plaintiff would enter into the service of the defendant, and serve him for a year from the —— day of

seems that a new contract arises each year which is determined at the expiration of the year without notice. Where the parties contracted "for one whole year, and so from year to year, so long as the parties should respectively please," it was held that the contract could not be determined by notice not ending with the current year. (*Williams* v. *Byrne*, 7 A. & E. 177.) And in such case it would seem that reasonable notice is necessary to determine it at the end of the current year; (per Littledale, J. *ib.* 182.)

A contract of service, "to be binding for twelve months certain, and continue from time to time, until three months' notice be given by either party to determine the same," was held determinable at the expiration of the first year by three months' previous notice. (*Brown* v. *Symons*, 8 C. B. N. S. 208; 29 L. J. C. P. 251.)

——, A.D. ——, in the capacity of [foreman], at the wages of £—— per week throughout the year, the defendant promised the plaintiff to retain him in the said service during the said year in the capacity and on the terms aforesaid; and the plaintiff entered into the said service in the capacity and on the terms aforesaid, and so continued therein for a part of the said year, and until the breach of the said promise hereinafter alleged, and was always ready and willing to continue in the said service during the remainder of the said year, whereof the defendant always had notice; yet the defendant, before the expiration of the said year, dismissed the plaintiff from the said service, and refused to retain the plaintiff therein for the remainder of the said year; whereby the plaintiff was deprived of the wages and profits which he would have derived from being retained in the said service, and remained for a long time unemployed. [*Under a special count for a wrongful dismissal, the plaintiff cannot recover wages accrued due for past services. If there be any claim for such wages an indebitatus count should be added: Hartley* v. *Harman*, 11 A. & E. 798; *see ante, p.* 191 *note* (*a*).]

Like counts: Metzner v. *Bolton*, 9 Ex. 518; *Hart* v. *Denny*, 1 H. & N. 609; *Horton* v. *M'Murtry*, 5 H. & N. 667; *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J. Ex. 459.

Counts on yearly hirings for wrongful dismissal, by a farm labourer: Lilley v. *Elwin*, 11 Q. B. 742; *by a bailiff: Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20; *by a gardener: Nowlan* v. *Ablett*, 2 C. M. & R. 54; *by a clerk to a merchant: Amor* v. *Fearon*, 9 A. & E. 548; *by an agent to a manufacturer: Parker* v. *Ibbetson*, 27 L. J. C. P. 236; *by a traveller and salesman: Spotswood* v. *Barrow*, 5 Ex. 110; *Metzner* v. *Bolton*, 9 Ex. 518; *Hart* v. *Denny*, 1 H. & N. 609; *Brown* v. *Symons*, 8 C. B. N. S. 208; 29 L. J. C. P. 251; *by a warehouseman: Fawcett* v. *Cash*, 5 B. & Ad. 904; *by an accountant: Baillie* v. *Kell*, 4 Bing. N. C. 638; *by a teacher in a school: Fillieul* v. *Armstrong*, 7 A. & E. 557; *by a governess: Todd* v. *Kerrich*, 8 Ex. 151; *by a reporter to a newspaper: Dunn* v. *Murray*, 9 B. & C. 780; *Gould* v. *Webb*, 4 E. & B. 933; *Williams* v. *Byrne*, 7 A. & E. 177; *by the editor of a periodical: Baxter* v. *Nurse*, 6 M. & G. 935; *by an attorney: Emmens* v. *Elderton*, 13 C. B. 495; *by a superintendent on a railway: Hill* v. *Great Western Ry. Co.*, 10 C. B. N. S. 148.

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* *Counts on special contracts of hiring for various periods for wrongful dismissal: by a manager or foreman of manufacturing works: Lomax* v. *Arding*, 10 Ex. 734; *Down* v. *Pinto*, 9 Ex. 327; *Hartley* v. *Harman*, 11 A. & E. 798; *Cussons* v. *Skinner*, 11 M. & W. 161; *Beckham* v. *Knight*, 1 M. & G. 738; *by a clerk to a shipping agent: Smith* v. *Thompson*, 8 C. B. 44; *by an attorney's articled clerk: Mercer* v. *Whall*, 5 Q. B. 447; *by a secretary: Wilkinson* v. *Gaston*, 9 Q. B. 137; *by an editor of a newspaper: Cooper* v. *Blick*, 2 Q. B. 915; *by a courier: Fischer* v. *Aidé*, 3 M. & W. 486; *by an actor: Webster* v. *Emery*, 10 Ex. 901; *by a seaman: Renno* v. *Bennett*, 3 Q. B. 768; *by a scene-painter: Harmer* v. *Cornelius*, 28 L. J. C. P. 85; 5 C. B. N. S. 236; *by a journeyman baker: Lush* v. *Russell*, 4 Ex. 637.

Count for refusing to permit the plaintiff to continue in the defendant's service under a special agreement of service: Cuckson v. *Stones*, 28 L. J. Q. B. 25; E. & E. 248.

By a Domestic Servant entitled to a Month's Warning or a Month's Wages against his Master for a wrongful Dismissal (see ante, p. 191 n. (a).)

That in consideration that the plaintiff would enter into the service of the defendant in the capacity of a domestic servant, and would serve him in that capacity until the service should be determined as hereinafter mentioned, at the wages of £—— per annum, the defendant promised the plaintiff to retain him in the defendant's service in the capacity and at the wages aforesaid until the expiration of a calendar month after notice given by the plaintiff or the defendant to the other of them to put an end to such service, and that in case the defendant should put an end to such service without such notice, he should pay to the plaintiff a proportionate part of such wages as aforesaid for a month; and the plaintiff accordingly entered into the said service of the defendant, and has always been ready and willing to continue therein in the capacity and on the terms aforesaid, of which the defendant always had notice; yet the defendant wrongfully dismissed the plaintiff from the said service without any such notice as aforesaid, and without paying the plaintiff such proportionate part of the said wages as aforesaid; whereby the plaintiff was deprived of the wages and advantages which he would have derived from the said service, and has remained for a long time unemployed.

A like count: Turner v. *Mason*, 14 M. & W. 112.

By a Servant against the Administrator of his Master on a Promise of the latter to pay the Plaintiff a Sum of Money for remaining in his Service till his Death.

(*Commence with the form, ante, p.* 15.) That the plaintiff was in the service of the said *G. H.* in his lifetime, in the capacity of a domestic servant, at certain wages, and on the terms that such service should continue until either the plaintiff or the said *G. H.* should determine the same by giving to the other of them a calendar month's notice of his intention so to do; and thereupon in consideration that the plaintiff would continue in the service of the said *G. H.*, in the capacity aforesaid, until the death of the said *G. H.*, the said *G. H.* promised the plaintiff to pay him £——; and the plaintiff accordingly continued in the service of the said *G. H.*, in the capacity aforesaid, until the death of the said *G. H.*, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said sum of £——; yet the same remains due and unpaid to the plaintiff.

By an employer against his servant for leaving the service before the term of service had expired: Lees v. *Whitcomb*, 5 Bing. 34.

For quitting without notice: Messiter v. *Rose*, 13 C. B. 162.

By a charterer of an emigrant ship against a surgeon retained to

serve on board in that capacity, for refusing to do so: Richards v. *Hayward*, 2 M. & G. 574.

By an employer against his servant for negligently doing work under the contract: Holmes v. *Onion*, 26 L. J. C. P. 261; 2 C. B. N. S. 790.

Medical Attendance.

Indebitatus Count for Attendance, Medicines, etc. (a).

Money payable by the defendant to the plaintiff for the work, care, and attendances of the plaintiff by him done and bestowed as a surgeon and apothecary, and otherwise, for the defendant and at his request, and for medicines and other materials and necessary things provided and supplied by the plaintiff for the defendant and at his request.

Mortgage.

Mortgagee against Mortgagor, on the Covenant for Repayment of the Mortgage Money (b).

That the defendant, by deed bearing date the —— day of ——,

(a) By "The Medical Act," 21 & 22 Vict. c. 90, s. 31, (amended by 22 Vict. c. 21), it is enacted that "every person registered under this Act shall be entitled, according to his qualification, to practise medicine or surgery, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients; provided always, that it shall be lawful for any college of physicians to pass a bye-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any court of law, and thereupon such bye-law may be pleaded in bar to any action for the purposes aforesaid commenced by any fellow or member of such college."

And by sect. 32, it is enacted that "after the 1st of January, 1859, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine, which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

This latter section applies to the evidence at the trial, and need not be pleaded. (See the decisions on the Apothecaries Act, 55 Geo. III. c. 194, s. 21, *Morgan* v. *Ruddock*, 4 Dowl. 311; *Shearwood* v. *Hay*, 5 A. & E. 383; *Wagstaffe* v. *Sharpe*, 3 M. & W. 521.) It does not apply to work done previous to the passing of the Act. (*Wright* v. *Greenroyd*, 31 L. J. Q. B. 4.)

Before the Act a physician by custom could not recover his fees in an action, without a special contract for payment. (*Chorley* v. *Bolcot*, 4 T. R. 317; *Veitch* v. *Russell*, 3 Q. B. 928; and see *Attorney-General* v. *College of Physicians*, 30 L. J. C. 757.)

(b) If the mortgage-deed contains no covenant for the repayment of the

A.D. ——, covenanted with the plaintiff to pay to the plaintiff £—— on the —— day of ——, A.D. ——, with interest for the same in the meantime at the rate of £—— per cent. per annum, but did not pay the same.

A like count: Payne v. *Mayor of Brecon*, 27 L. J. Ex. 495; 3 H. & N. 572.

Count on a covenant in a mortgage-deed to keep up a policy, and pay premiums as additional security: Bennett v. *Burton*, 12 A. & E. 657; *Warburg* v. *Tucker*, 24 L. J. Q. B. 317; 28 L. J. Q. B. 56; 5 E. & B. 384; *Young* v. *Winter*, 16 C. B. 401; *and see* "*Insurance*," *ante*, p. 163; *National Ins. Co.* v. *Best*, 27 L. J. Ex. 19; 2 H. & N. 605.

Count on a covenant in a deed of mortgage of leaseholds, to observe the covenants in the lease and to keep the premises insured: Greet v. *Webb*, 5 H. & N. 599.

Mortgagee against Mortgagor on a Covenant to pay Interest on the Mortgage Debt.

That the defendant, by deed bearing date the —— day of ——, A.D. ——, covenanted with the plaintiff that the defendant would pay to the plaintiff the sum of £ ——, on the —— day of ——, A.D. ——, with interest for the same in the meantime at the rate of £—— per cent. per annum, and that if the said sum of £—— should remain unpaid after the last-mentioned day, the defendant would, so long as the same or any part thereof should remain unpaid after that day, pay to the plaintiff interest at the rate aforesaid for the said sum, or for so much thereof as should for the time being remain unpaid, by equal half-yearly instalments on the —— day of ——, and the —— day of ——, in every year; and the said sum of £—— remained unpaid after the said —— day of ——, A.D. ——, and £—— for —— half-yearly instalments of the last-mentioned interest became due to the plaintiff, and is still unpaid.

Count on a bond of guarantee for the payment of the interest on a mortgage-debt and the premiums on a policy: Wodehouse v. *Farebrother*, 25 L. J. Q. B. 18; 5 E. & B. 277.

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debt, the common count for money lent will lie. (*Yates* v. *Aston*, 4 Q. B. 182; *Mathew* v. *Blackmore*, 26 L. J. Ex. 150; 1 H. & N. 762; see *ante*, 32 n. (*a*).) A covenant is sometimes implied from a mere acknowledgment of the debt in the deed, but not where the object of the deed is some other purpose. (*Courtney* v. *Taylor*, 6 M. & G. 851.) Such a covenant cannot be implied, where the deed was executed for the sole purpose of securing the debt, though it contained an express acknowledgment. (*Marryat* v *Marryat*, 29 L. J. C. 665.)

The court has a summary jurisdiction under the statute 7 Geo. II. c. 20, to stay proceedings in actions for mortgage debts; and under the C. L. P. Act, 1852, s. 219, in actions of ejectment by a mortgagee, see *post*, c. 5, "Mortgage."

Partners (*a*).

(*a*) *Partners.*]—When a contract is made with partners who are all actual parties to it, they must all join in suing, otherwise there will be a variance at the trial, which, unless amended, will be ground of nonsuit; and all the partners must be sued jointly, otherwise the partner or partners sued may plead in abatement the non-joinder of the other partner or partners; but they cannot take any other advantage of this defect, see post, c. 5, "*Abatement.*"

Where the contract is made in a partnership name or style only, without mention of individual names, the question arises with whom the contract was actually made, that is to say, who were the persons represented in the contract under the partnership name, and the solution of this question will determine who ought to sue and to be sued upon it. (*Carter* v. *Whalley*, 1 B. & Ad. 11; *Hallett* v. *Dowdall*, 18 Q. B. 2; *Cox* v. *Hickman*, 30 L. J. C. P. 125; 9 C. B. N. S. 47.) Thus, where a policy of insurance is made in the name of an unincorporated company or partnership, all the members may be sued, though they have not signed it. (*Hallett* v. *Dowdall*, 18 Q. B. 2.) And where the plaintiff carried on business under the name of himself and son, it was held that the plaintiff could not alone sue a party dealing with him in the business without giving proof that his son was not a partner. (*Teed* v. *Elworthy*, 14 East, 210.) But in a similar case, upon proof that the son was not a partner and that the father was solely interested in the business, the latter was held entitled to maintain the action. (*Kell* v. *Nainby*, 10 B. & C. 20.) Where the plaintiff sued the defendant upon a bill accepted in the name of a company, and the defendant had ceased to be a partner in the company before the bill was accepted, and had never represented himself to the plaintiff as a partner, it was held that he was not liable. (*Carter* v. *Whalley*, 1 B. & Ad. 11.)

Where the contract is made in a partnership name, and there are partners who did not appear in the transaction and were unknown to the other contracting party, the secret partners are in the position of undisclosed principals; and although they may join in suing upon the contract the other contracting party cannot be compelled to sue them. He may join them with the ostensible partners as defendants if he pleases; or he may sue the ostensible partners only, and in the latter case there is no ground for a plea in abatement of the non-joinder of the secret partners. (*De Mautort* v. *Saunders*, 1 B. & Ad. 398.)

Where a contract is made *with* one partner in his own name only, without mention of his firm, on account of the partnership business, the other partners may join with him in suing upon it. (*Skinner* v. *Stocks*, 4 B. & Ald. 437; *Garrett* v. *Handley*, 4 B. & C. 664; *Cothay* v. *Fennell*, 10 B. & C. 671; *Robson* v. *Drummond*, 2 B. & Ad. 303; *Alexander* v. *Barker*, 2 C. & J. 133.) And it would seem that in such case the contracting partner may sue alone upon the contract (*Mawman* v. *Gillett*, 2 Taunt. 325, n. (*a*); *Lloyd* v. *Archbowle*, 2 Taunt. 324), upon the same principle that where an agent contracts for an undisclosed principal either the former or latter may sue upon it. (*Sims* v. *Bond*, 5 B. & Ad. 389, 393; 2 Smith's L. C. 5th ed. 336.) And it would also seem that the right of the undisclosed partners to the benefit of the contract is, like that of the undisclosed principal, subject to the equities and defences which the defendant may have against the partner who actually contracted. (*Robson* v. *Drummond*, 2 B. & Ad. 303; and see *Skinner* v. *Stocks*, 4 B. & Ald. 437; *George* v. *Claggett*, 7 T. R. 359.)

Where the contract is made *by* one partner in his own name, on account of the partnership business, he may be sued alone upon it, or the other partners may be joined with him as co-defendants. Thus, where the two ostensible partners in a business signed a written agreement for the service

of the plaintiff in their business, the plaintiff was held entitled to sue them jointly with another partner who had not signed the agreement, and who was unknown to him at the time of making it. (*Beckham* v. *Drake*, 9 M. & W. 79; 11 M. & W. 315.)

The test of liability of a partner, who is not an actual party to the contract, is whether the partner or partners who contracted did so in the capacity of agents for him. (*Cox* v. *Hickman*, 30 L. J. C. P. 125; 9 C. B. N. S. 47.) Thus, where a business was carried on by trustees, in the name of a company, for the benefit of creditors who received the profits in payment of their debts, and the trustees accepted bills in the name of the company, the creditors were held not to be liable because the trustees did not carry on the business as their agents. (*Ib.*)

In cases of doubt as to the proper joinder of co-plaintiffs the C. L. P. Act, 1860, s. 19, which authorizes the joinder as plaintiffs of all persons supposed to be legally entitled, will apply (see post, "*Abatement*," c. 5); and it will, in general, be advisable to join all persons who may appear to have an interest as partners.

One partner cannot sue another at law upon any matter involving the partnership accounts. (*Green* v. *Beesley*, 2 Bing. N. C. 108; *Carr* v. *Smith*, 5 Q. B. 128; *Holmes* v. *Higgins*, 1 B. & C. 74; *Wilson* v. *Curzon*, 15 M. & W. 532; *Bovill* v. *Hammond*, 6 B. & C. 149; Smith's Mercantile Law, 6th ed. p. 35.) Partners may sue each other in respect of matters independent of the partnership, or on express covenants and agreements. (*Brown* v. *Tapscott*, 6 M. & W. 119.) Or on certain terms of an agreement by which the one party is rendered liable to the other in an action, notwithstanding that by other terms of the same agreement a partnership is constituted. (*Blech* v. *Balleras*, 29 L. J. Q. B. 261.) The members of a private co-partnership, as a cost-book mining company, cannot stipulate by their rules that unpaid calls shall be recovered as a debt from the defaulting shareholder to the purser, so as to enable the latter to maintain an action for the calls against the shareholder. (*Hybart* v. *Parker*, 4 C. B. N. S. 209; 27 L. J. C. P. 120.)

If one partner advance for the other a sum of money as the share of the latter of the partnership capital, he may recover it by action. (*Venning* v. *Leckie*, 13 East, 7; *French* v. *Styring*, 26 L. J. C. P. 181; 2 C. B. N. S. 357.) So also one partner may sue another for his share of the produce of the partnership transaction, after a final account stated and a balance acknowledged to be due. (*Foster* v. *Allanson*, 2 T. R. 479; *Jackson* v. *Stopherd*, 2 C. & M. 361; *Bovill* v. *Hammond*, 6 B. & C. 149; *Coffee* v. *Brian*, 3 Bing. 54; *Wray* v. *Milestone*, 5 M. & W. 21; *Henley* v. *Soper*, 8 B. & C. 16, 20.)

The jurisdiction of the county courts extends to the recovery of any demand, not exceeding the sum of £50, which is the whole or part of the unliquidated balance of a partnership account. (9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61, s. 1.)

A contract made with a partnership respecting matters connected with the partnership business, is generally construed as applicable to the existing partnership and business, and is terminated by a dissolution or change of the partnership or alteration in its business, unless the contrary intention expressly appears. (*Lord Arlington* v. *Meyrricke*, 2 Saund. 414 n. (5); *Robson* v. *Drummond*, 2 B. & Ad. 303; *Dry* v. *Davy*, 10 A. & E. 30; *Chapman* v. *Beckington*, 3 Q. B. 703; *Tasker* v. *Shepherd*, 6 H. & N. 575.) With respect to contracts of guarantee it is enacted by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 4, "that no promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person

Indebitatus Count by a surviving Partner on Causes of Action accrued to the Firm (a).

[*If the deceased partner died before the writ issued, commence with the ordinary form, see ante, p.* 10. *If the deceased partner died since the writ issued, commence with the form, ante, p.* 10.] Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff and *G. H.*, since deceased, to the defendant, and for goods bargained and sold by the plaintiff and the said *G. H.* to the defendant, and for work done and materials provided by the plaintiff and the said *G. H.* for the defendant at his request, and for money lent by the plaintiff and the said *G. H.* to the defendant, and for money paid by the plaintiff and the said *G. H.* for the defendant at his request, and for money received by the defendant for the use of the plaintiff and the said *G. H.*, and for money found to be due from the defendant to the plaintiff and the said *G. H.*, on accounts stated between them, and for money found to be due from the defendant to the plaintiff on accounts stated between them. [*Counts may be added, stating causes of action accruing to the plaintiff only, whether concerning the partnership business or altogether independent of it.* (*Slipper* v. *Stidstone*, 5 T. R. 493.) *And an account stated with him should, at all events, be added as above.*]

Count by the surviving drawer of a bill of exchange against the acceptor, ante, p. 86.

Count against a surviving partner on a contract made with the firm for the employment of the plaintiff during a certain period, for not continuing the employment: see Tasker v. *Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207.

Count for breach of an agreement to enter into partnership with the plaintiff: Andrewes v. *Garstin*, 31 L. J. C. P. 15.

Count on a covenant in a partnership deed, that the business

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making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

(*a*) In an action by a surviving partner, on causes of action accrued to the plaintiff and his deceased partner jointly, the plaintiff must sue as survivor, stating the joint contract and the death of the joint promisee. (*Jell* v. *Douglas*, 4 B. & Ald. 374.)

In an action against a surviving partner on contracts made with the firm, the contract may be described as made by the defendant alone; the non-joinder of a joint contractor as defendant being ground only for a plea in abatement, and such a plea being impossible after the death of the joint contractor. See *ante*, p. 11. Under a count in the usual form charging a defendant only, the plaintiff may recover a demand due from the defendant alone, and another due from him as surviving partner. (*Richards* v. *Heather*, 1 B. & Ald. 29.)

should be carried on at a certain shop, with breach for closing the shop: Hodges v. *Gray*, 4 Dowl. 733.

PATENTS (*a*).

Indebitatus Count for a License to use a Patent.

Money payable by the defendant to the plaintiff for the license and permission of the plaintiff, by him granted to the defendant at his request, to use a patent invention whereof the plaintiff was owner, and for the defendant's use of the said patent invention under the said license and permission.

Like counts: Chanter v. *Hopkins*, 4 M. & W. 399; *Chanter* v. *Dewhurst*, 12 M. & W. 823.

Indebitatus count for license to make and sell patent manure at an agreed price per ton for the license: Lawes v. *Purser*, 26 L. J. Q. B. 25; 6 E. & B. 930.

Special counts to recover royalties and rents payable under agreements for licenses to use patents: Chanter v. *Leese*, 4 M. & W. 295; 5 M. & W. 698; *Hall* v. *Bainbridge*, 5 Q. B. 233; *Oxley* v. *Holden*, 30 L. J. C. P. 68; 8 C. B. N. S. 666.

Against the licensee of a patent on a covenant to pay a certain sum per ton for goods manufactured, and to deliver true accounts, and to permit the patentee to inspect the books: Smith v. *Scott*, 28 L. J. C. P. 325.

On an agreement for the assignment of a share in a patent to be taken out by the plaintiff in consideration of the defendant paying all the fees and expenses, for non-payment of the same: Hill v. *Mount*, 25 L. J. C. P. 190; 18 C. B. 72; *Hall* v. *Conder*, 26 L. J. C. P. 138, 288; 2 C. B. N. S. 22.

Count on a contract to assign a patent in consideration of a percentage on the profits, the defendant to provide for the payments on the patent, with breach in not providing for the payment: Smith v. *Neale*, 26 L. J. C. P. 143; 2 C. B. N. S. 67.

Against the Licensee of a Patent upon a Covenant to manufacture Goods of a good Quality, so as not to injure the Patent.

That Her Majesty Queen Victoria, by letters patent under the great seal of England [*or* of the United Kingdom], granted to the plaintiff the sole privilege to make, use, exercise, and vend, within England [*or* the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, *or as the case may be*], for the term of fourteen years from the —— day of ——, A.D. ——, a certain invention relating to the manufacture of [sulphuric acid], and afterwards and whilst the said patent was a valid and

(*a*) On the grant of a license to use a patent, and on an assignment of a patent, there is no implied warranty that the patent is valid. (*Hall* v. *Conder*, 26 L. J. C. P. 168, 288; 2 C. B. N. S. 22; *Smith* v. *Scott*, 28 L. J. C. P. 325.) But the assignor can take no advantage of the invalidity of the patent as against the assignee. (*Walton* v. *Lavater*, 29 L. J. C. P. 275; and see *Oxley* v. *Holden*, 30 L. J. C. P. 68, 72, 75.)

subsisting patent and in full force and effect, the plaintiff, by deed dated the —— day of ——, A.D. ——, granted to the defendant the license and privilege to use, exercise and put in practice the said invention for the remainder of the said term; and the defendant by the said deed covenanted with the plaintiff that all [sulphuric acid] manufactured by him in pursuance of the said license should be of good materials and quality, so as not to injure the reputation of the said invention; and the defendant afterwards manufactured and sold [sulphuric acid], in pursuance of the said license; yet divers quantities of the said [sulphuric acid] so manufactured and sold by the defendant as aforesaid were not of good materials and quality, so as to injure the reputation of the said invention; whereby the reputation of the said invention has been injured, and the said patent became and is diminished in value.

Count against the licensee of a patent on a covenant not to make or sell any machines without the patented addition to them: Jones v. *Lees*, 26 L. J. Ex. 9; 1 H. & N. 189.

Penal Statutes (*a*).

Commencement of Declaration by an Informer Qui tam, *ante, p.* 26.

(*a*) In penal actions brought by a common informer the venue is local, and must be laid in the county in which the penal act is committed, by statutes 31 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 4, s. 2. The statute of Elizabeth extends to penal actions given by subsequent statutes; the statute of James applies only to penal actions then existing. (*Barber* v. *Tilson*, 3 M. & S. 429.) Such actions may be tried in another county than that stated in the venue, by order of the court or a judge, under the statute 3 & 4 Will. IV. c. 42, s. 22. (*Greenhow* v. *Parker*, 31 L. J. Ex. 4; and see *ante*, p. 3.) Actions given to parties grieved are not within the above statutes; and in these actions the venue is transitory. (*Fife* v. *Bousfield*, 6 Q. B. 100.) The declaration must state that the act was done against the form of the statute, otherwise it will be bad in arrest of judgment. (*Fife* v. *Bousfield*, 6 Q. B. 100.) In *qui tam* actions for a penalty, where the action is given to the party grieved, the declaration must state as a fact that the plaintiff is a party grieved; and if the consent of the Attorney-General is made necessary, the declaration must also state that it has been obtained, otherwise the declaration would be bad on demurrer. (*Hollis* v. *Marshall*, 27 L. J. Ex. 235; 2 H. & N. 755.) It is not, in general, necessary to aver an authority to sue from the Crown or from the party entitled to the penalties. (*Cole* v. *Coulton*, 29 L. J. M. C. 125, 127.)

In penal actions no damages are recoverable for the detention of the debt, because no debt is due until judgment. (*Frederick* v. *Lookup*, 4 Burr. 2018; *Cuming* v. *Sibly*, 4 Burr. 2489.)

As to the limitation of penal actions see *post*, c. 5, "*Limitation*."

References are given to the above forms irrespectively of some of the statutes on which they were founded being repealed, as they will still be found useful in framing declarations on existing statutes passed in like cases.

Count for the Penalty for Bribery at an Election, under the Corrupt Practices Prevention Act, 1854 (17 *&* 18 *Vict. c.* 102, *s.* 2).

That after the passing of the Corrupt Practices Prevention Act, 1854, on the —— day of ——, A.D. ——, at an election holden in and for the borough of —— of a member to serve in Parliament for the said borough, and at which said election *G. H.* was a candidate within the meaning of the said Act, the defendant by himself [*or* by *J. K.* on his behalf] gave [*or* agreed to give] money to *L. M.* [*or* to *N. O.* on behalf of *L. M.*], then being a voter at the said election for the said borough, in order to induce the said *L. M.* to vote at the said election for the said *G. H.* [*or* refrain from voting at the said election], contrary to the said statute, whereby the defendant became liable to forfeit and forfeited the sum of £100 to the plaintiff, who sues the defendant for the same in this action under the said statute.

Like counts: Cooper v. *Slade,* 25 L. J. Q. B. 324; 6 E. & B. 447; *Reed* v. *Lamb,* 29 L. J. Ex. 452; 6 H. & N. 75; *Taylor* v. *Vergette,* 30 L. J. Ex. 400.

Like counts under 2 *Geo. II. c.* 24 [*now repealed but re-enacted in substance by* 17 *&* 18 *Vict. c.* 102]: *Henslow* v. *Fawcett,* 3 A. & E. 51; *Lord Huntingtower* v. *Gardiner,* 1 B. & C. 297; *Harding* v. *Stokes,* 1 M. & W. 354; 2 M. & W. 233; *Webb* v. *Smith,* 4 Bing. N. C. 373.

Count for a penalty under the Municipal Corporation Act, 5 *&* 6 *Will. IV. c.* 76, *s.* 28, *for acting as a councillor without qualification: Simpson* v. *Ready,* 12 M. & W. 736.

Against an overseer for a penalty for not making out a burgess list under the Municipal Corporation Act: King v. *Burrell,* 12 A. & E. 460; *King* v. *Share,* 3 Q. B. 31; *Hunt* v. *Hibbs,* 29 L. J. Ex. 222; 5 H. & N. 123.

Against a guardian of the poor of a union for the penalty for supplying goods to the workhouse for his own profit, under 53 *Geo. III. c.* 137, *s.* 6, *and* 4 *&* 5 *Will. IV. c.* 76, *s.* 51: *Greenhow* v. *Parker,* 31 L. J. Ex. 4.

For a penalty for acting as an apothecary without a certificate under 55 *Geo. III. c.* 194, *s.* 20: *Apothecaries Co.* v. *Greenough,* 1 Q. B. 799; *Apothecaries Co.* v. *Allen,* 4 B. & Ad. 625.

Against the master of a ship for not taking a pilot on board, under 6 *Geo. IV. c.* 125, *s.* 70: *Beilby* v. *Scott,* 7 M. & W. 93; *and see Merchant Shipping Act,* 1854, 17 *&* 18 *Vict. c.* 104, *ss.* 353, 376, 508.

Against a stockbroker for acting as such without being admitted under 57 *Geo. III. c.* 60: *Clarke* v. *Powell,* 4 B. & Ad. 846.

Against an officer of a county court for acting as attorney for a party in a proceeding in the court: 9 & 10 Vict. c. 95, s. 24, 30; *Ackroyd* v. *Gill,* 5 E. & B. 808; *Warden* v. *Stone,* 7 E. & B. 603.

Against a magistrate's clerk for taking excessive fees, under 26 *Geo. III. c.* 14, *s.* 2: *Bowman* v. *Blyth,* 7 E. & B. 26.

For penalties under 10 *Geo. II. c.* 28, *s.* 2, *for acting unlicensed plays: Parsons* v. *Chapman*, 5 C. & P. 33.

For penalties for infringing the copyright in a dramatic performance, under 3 *&* 4 *Will. IV. c.* 15: *Fitzball* v. *Brooke*, 6 Q. B. 873; *Shepherd* v. *Conquest*, 25 L. J. C. P. 127; 17 C. B. 427.

For penalties for the unauthorized use of the name of a patent, under 5 *&* 6 *Will. IV. c.* 87, *s.* 7: *Myers* v. *Baker*, 28 L. J. Ex. 90.

For penalties against the parties to a fraudulent conveyance, under 13 *Eliz. c.* 5: *Butcher* v. *Harrison*, 4 B. & Ad. 129.

For penalties for fouling the neighbouring water by washings from gas works, under a local Act: Hipkins v. *Birmingham Gas Works*, 29 L. J. Ex. 169.

See other counts on penal statutes, post, c. 3, "*Sheriffs.*"

PENALTY. *See* "*Liquidated Damages,*" *ante,* p. 188.

PRINCIPAL AND SURETY. *See* "*Guarantee,*" *ante,* p. 138.

PROMISSORY NOTES. *See* "*Bills of Exchange,*" *ante,* p. 91.

RECOGNIZANCE OF BAIL. *See* "*Bail,*" *ante,* p. 71.

REPLEVIN BONDS (*a*).

On a Replevin Bond conditioned to sue in the County Court, under 19 *&* 20 *Vict. c.* 108, *s.* 66.

That the defendants, by their bond bearing date the —— day of

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(*a*) Formerly the sheriff was the proper officer to grant replevins and to take replevin bonds. By the Act 19 & 20 Vict. c. 108, to amend the County Courts Acts, s. 63, it was enacted that the powers and responsibilities of the sheriff with respect to replevin bonds and replevins should cease. And by ss. 64–66 an authority to grant replevins and to approve replevin bonds was given to the registrar of the county court.

The replevin bonds now required upon granting replevins are of two kinds: the one under s. 65 conditioned to bring the action of replevin in

——, A.D. ——, became bound to the plaintiff in the sum of £——, to be paid by the defendants to the plaintiff, subject to a condition that if the defendant *E. F.* should within one month from the date of the said bond commence an action of replevin against the now plaintiff *A. B.* in the county court of ——, holden at ——, for taking and unjustly detaining certain goods of the said *E. F.* in the said condition mentioned, and prosecute such action with effect and without delay, and should also make return of the said goods, if a return thereof should be adjudged, then the said bond should be void; and the defendant *E. F.* did not within one month from the date of the said bond, which period had elapsed before this suit, commence an action of replevin according to the said terms of the said condition, [*or*, and although the said *E. F.* did commence such action of replevin according to the terms of the said condition, yet he did not prosecute the said action of replevin with effect and without delay; *or*, and although the said *E. F.* did commence such action of replevin according to the terms of the said condition, and a return of the said goods was in the said action adjudged to the now plaintiff, and a reasonable time for the said *E. F.* to return the same accordingly elapsed, yet the said *E. F.* has not made a return of the said goods, *adopting the breaches required by the facts.*]

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one of the superior courts; the other, under s. 66, conditioned to bring the action in the county court. Also, by s. 67, a bond with sureties must be given by a defendant upon removal of an action of replevin from a county court by *certiorari*, conditioned to defend the action, which security is to be approved of by the master of the court.

By s. 70, all such bonds are to be given to the other party in the action or proceeding. When the sheriff granted replevin, the bond was given to the sheriff and not to the party; and if it became necessary to put the bond in suit, the sheriff assigned the bond to the other party to the replevin, under the statute 11 Geo. II. c. 19, s. 23. The registrar of the county court is now no party to the bond, and no assignment is necessary; it may be put in suit by the one party against the other, like any other bond (see *ante*, "*Bonds*," p. 96.) Formerly also the sheriff was liable to an action if he took a replevin bond with insufficient sureties (*Tesseyman* v. *Gildart*, 1 B. & P. N. R. 292; *Baker* v. *Garratt*, 3 Bing. 56; *Paul* v. *Goodluck*, 2 Bing. N. C. 220); but, as under the existing statute the duty of the registrar of the county court is limited to approving of the security to be given, consisting of a bond with sureties under s. 70, it would seem that he is not liable for the insufficiency of the sureties unless perhaps he be guilty of negligence (see *Young* v. *Brompton, Chatham, and Gillingham Waterworks Co.*, 31 L. J. Q. B. 14.)

By s. 70 of the Act, the court in which any action on the bond shall be brought, may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond.

By the C. L. P. Act, 1860, s. 22, it is enacted, that the provisions of the Act 19 & 20 Vict. c. 108, which relate to replevin (being those above cited) shall be deemed and taken to apply to all cases of replevin in like manner as to the cases of replevin of goods distrained for rent or damage feasant.

By s. 23 the plaintiff in replevin may, in answer to an avowry, pay money into court, see *post*, c. 6, "*Payment into Court*," "*Replevin*;" and by s. 24 such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

On a Replevin Bond conditioned to sue in a superior Court, under 19 & 20 Vict. c. 108, s. 65.

That the defendants, by their bond bearing date the —— day of ——, A.D. ——, became bound to the plaintiff in the sum of £——, to be paid by the defendants to the plaintiff, subject to a condition that if the defendant *E. F.* should within one week from the date of the said bond commence an action of replevin against the now plaintiff in her Majesty's court of —— at Westminster for taking and unjustly detaining certain goods of the said *E. F.* in the said condition mentioned, and prosecute such action with effect (*a*) and without delay, and unless judgment should be obtained thereon by default should prove before the said court that the said *E. F.* had good ground for believing that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which such distress was made exceeded £20, and should make a return of the said goods if a return thereof should be adjudged, then the said bond should be void; and the said *E. F.* did not, within one week from the date of the said bond, which period had elapsed before this suit, commence an action of replevin according to the said terms of the said condition [*or*, and although the said *E. F.* did commence such action of replevin according to the terms of the said condition, yet he did not prosecute such action with effect and without delay; *or*, and although the said *E. F.* did commence such action of replevin according to the terms of the said condition, and although judgment in the said action was not obtained by default, yet the said *E. F.* did not prove before the said court of —— that he had good ground for believing that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which such distress was made exceeded £20; *or*, and although the said *E. F.* did commence such action of replevin according to the terms of the said condition, and although a return of the said goods was in the said action adjudged to the now plaintiff, and a reasonable time for the said *E. F.* to return the same accordingly elapsed, yet the said *E. F.* has not made a return of the said goods, *adopting the breaches required by the facts.*]

On a replevin bond given by a defendant in replevin upon removal by certiorari, conditioned to defend with effect, under 9 & 10 Vict. c. 95, s. 121 (now re-enacted by 19 & 20 Vict. c. 108, s. 67): Tummons v. *Ogle*, 25 L. J. Q. B. 403; 6 E. & B. 571.

Reward.

Counts on promises made in advertisements to pay rewards for the recovery of stolen property, or for the discovery of a robbery, upon

(*a*) The term "prosecute with effect" means to carry the suit to a termination successful to the party, whether plaintiff or defendant. (*Tummons* v. *Ogle*, 25 L. J. Q. B. 403; 6 E. & B. 571.)

the conviction of the offenders (*a*): *Lancaster* v. *Walsh*, 4 M. & W. 16; *England* v. *Davidson*, 11 A. & E. 856; *Thatcher* v. *England*, 3 C. B. 254.

Count on a promise made by an advertisement offering a premium to the architect who should produce the best plan for a building: Ward v. *Lowndes*, 28 L. J. Q. B. 265.

Sale: I. Of Goods (*a*).

Indebitatus Count for Goods sold and delivered.

See form ante, p. 31. *As to when this count is applicable, see ib. n.* (*b*).

Indebitatus Count for Goods bargained and sold. (*C. L. P. Act*, 1852, *Sched. B.* 1.)

See form ante, p. 32. *As to when this count is applicable, see ib. n.* (*c*).

Vendor against Purchaser on a Contract to Pay for Goods sold by accepting a Bill of Exchange (*c*).

That the plaintiff bargained and sold to the defendant, and the

(*a*) As to the right to sue for the reward, see the above cases, and also *Williams* v. *Carwardine*, 4 B. & Ad. 621; *Lockhart* v. *Barnard*, 14 M. & W. 674; *Smith* v. *Moore*, 1 C. B. 438; *Gerhard* v. *Bates*, 2 E. & B. 488; *Hernaman* v. *Smith*, 10 Ex. 659. The common count for work would perhaps be sufficient, (see per Crompton J. *Denton* v. *Great Northern Ry. Co.*, 25 L. J. Q. B. 129, 135; 5 E. & B. 868.)

(*b*) By the Statute of Frauds, 29 Car. II. c. 3, s. 17, it is enacted, "that no contract for the sale of any goods, wares or merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall, first, accept part of the goods so sold, and actually receive the same; or, secondly, shall give something in earnest to bind the bargain, or in part of payment; or, thirdly, unless some memorandum or note in writing, of the said bargain, be made, and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

By Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 7, it is enacted, with reference to the above section, that the said enactments shall extend to all contracts for the sale of goods, of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. As to the decisions on these statutes see Chit. Contr. 5th ed. 343; Taylor on Evidence, 3rd ed. 853; Roscoe on Evidence, 10th ed. 355.

(*c*) Where goods are sold upon a contract to pay for them by a bill and no bill is given, the common count for goods sold and delivered will not lie until the period of the proposed bill has elapsed; but the vendor may at once bring an action for the breach of contract in not giving the bill. (*Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 B. & P. 582.)

defendant bought from the plaintiff, certain goods [*or*, ten sacks of flour (*a*)] at the price of £—— [*or*, of £—— per sack], on the terms that the said goods should be delivered by the plaintiff to the defendant, and should be paid for by the defendant's acceptance of the plaintiff's bill of exchange for the price thereof, payable to the plaintiff or order at —— months' date from the delivery of the said goods; and the plaintiff delivered the said goods to the defendant on the terms aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid for the said goods as aforesaid; yet the defendant did not pay for the said goods by his acceptance of such bill as aforesaid.

Like counts: Fair v. *M'Iver*, 16 East, 130; *Spaeth* v. *Hare*, 9 M. & W. 326; *Clemontson* v. *Blessig*, 11 Ex. 135.

Count on a contract to pay for goods shipped "free on board" by bills of exchange: Browne v. *Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; 4 H. & N. 822.

Vendor against Purchaser on a Contract to pay for Goods a Valuation Price by a Bill of Exchange, for not accepting such Bill.

That the plaintiff bargained and sold to the defendant, and the defendant bought from the plaintiff, certain goods [*or, state the kind of goods*], at a price to be fixed by the valuation of a person appointed by the plaintiff and of a person appointed by the defendant, such price to be paid by the defendant's acceptance of the plaintiff's bill of exchange for the amount of the said price, payable to the plaintiff's order at —— months' date from the delivery of the said goods; and the plaintiff delivered the said goods to the defendant on the terms aforesaid, and the said price thereof was fixed by the said persons so appointed to value the same as aforesaid at £——, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid for the said goods as aforesaid; yet the defendant did not pay the said price of the said goods by his acceptance of such bill as aforesaid.

A like count: Gordon v. *Whitehouse*, 25 L. J. C. P. 300; 18 C. B. 747.

Count for not paying to a third person, as agreed, the price of goods sold by the plaintiff to the defendant: Pauling v. *London & North-Western Ry. Co.*, 8 Ex. 867; 23 L. J. Ex. 105.

Vendor against Purchaser for not accepting the Goods sold (*b*).

That the plaintiff bargained and sold to the defendant, and the

(*a*) It is advisable in all cases to state the kind of goods, as this tends to identify the transaction, and makes it less necessary for the defendant to apply for particulars of the plaintiff's demand.

(*b*) The measure of damages in an action for not accepting goods under a contract of sale, is the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted (*Boorman* v. *Nash*, 9 B. & C. 145; *Philpotts* v. *Evans*, 5 M. & W. 475); and the purchaser cannot anticipate the claim for damages

defendant bought from the plaintiff, certain goods [*or, state the kind of goods*], at the price of £——, upon the terms, that the plaintiff should deliver the said goods to the defendant, and that the defendant should accept the same from the plaintiff, and pay him the said price for the same upon such delivery; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods accepted as aforesaid; yet the defendant did not accept the said goods from the plaintiff, or pay him for the same; whereby the plaintiff incurred expense in keeping the said goods, and in reselling the same, and also a loss upon such resale.

Like counts: Boyd v. *Lett*, 1 C. B. 222; *Graves* v. *Legg*, 9 Ex. 709; *Jones* v. *Clarke*, 2 H. & N. 725; *Macdonald* v. *Longbottom*, 28 L. J. Q. B. 293.

Like counts on bought and sold notes: Lucas v. *Bristow*, 27 L. J. Q. B. 364; *Beckh* v. *Page*, 28 L. J. C. P. 164; 5 C. B. N. S. 708.

For not accepting goods to be delivered at a particular place: Philpotts v. *Evans*, 5 M. & W. 475.

For not accepting goods under a contract of sale, the price to be determined by two valuers: Thurnell v. *Balbirnie*, 2 M. & W. 786.

For refusing to accept the transfer of a ship under a contract of sale: Duncan v. *Tindall*, 13 C. B. 258.

Count for not accepting shares sold: See post, "*Shares*," p. 222.

Vendor against Purchaser, on a Contract for the Sale of Goods to be delivered at different Times and to be paid for on Delivery, for not accepting.

That the plaintiff bargained and sold to the defendant, and the defendant bought of the plaintiff, —— tons of oil at the price of £—— per ton, to be free delivered by the plaintiff, and to be accepted by the defendant, half in the month of —— then next, and the remainder in the month of —— then next, and each half of the said goods to be paid for by the defendant to the plaintiff upon delivery thereof in ready money, allowing £—— per cent. discount; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods accepted as aforesaid; yet the defendant did not, at either of the times aforesaid, accept the said oil or any part thereof from the plaintiff or pay him for the same.

Like counts: Boorman v. *Nash*, 9 B. & C. 145; *Baker* v. *Firminger*, 28 L. J. Ex. 130.

On a contract to sell and deliver weekly a certain quantity of iron mine, for not accepting: Jackson v. *Allaway*, 6 M. & G. 942.

For not accepting iron to be shipped in equal quantities in successive months: Hoare v. *Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19.

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by giving previous notice of his intention not to accept the goods, unless the vendor assents to such notice. (*Philpotts* v. *Evans, supra; Ripley* v. *M'Clure*, 4 Ex. 345; and see *Leigh* v. *Paterson*, 8 Taunt. 540.) If there is no difference proved between the contract price and the market price, only nominal damages can be recovered (see *Valpy* v. *Oakeley*, 16 Q. B. 941).

On a contract to deliver a certain quantity of coal weekly, for not delivering: Wood v. *Copper Miners Co.* 14 C. B. 428; *Eastern Co. Ry.* v. *Philipson,* 16 C. B. 2.

Vendor against Purchaser for not Removing from the Plaintiff's Land Timber sold to the Defendant.

That the plaintiff bargained and sold to the defendant, and the defendant bought of the plaintiff, —— feet of timber, then lying upon land of the plaintiff, at the price of —— per foot thereof, to be carried away by the defendant from the said land within a reasonable time then next following, and to be paid for by the defendant when carried away at the rate aforesaid; and although the plaintiff has always been ready and willing to permit the defendant to carry away the said timber from the said land, whereof the defendant had notice, and a reasonable time for carrying away and paying for the same as aforesaid elapsed; yet the defendant has not carried away the said timber from the said land, or paid the plaintiff for the same.

A like count: Smith v. *Surman,* 9 B. & C. 561.

For not removing goods sold at a public auction, which were consequently resold according to the conditions of sale: Pettitt v. *Mitchell,* 4 M. & G. 819; *and see Lamond* v. *Davall,* 9 Q. B. 1030; *ante,* 32 *n.* (*a*).

Count on a contract to make goods to order, for not accepting the goods made: Stott v. *Eastern Co. Ry. Co.* 12 M. & W. 33; *and see post,* "*Work,*" *p.* 235.

On a contract to make and fit up utensils for brewing, for discharging the plaintiff from the completion of the contract: Pontifex v. *Wilkinson,* 1 C. B. 75; 2 C. B. 359.

On a contract under seal to manufacture and supply goods for the defendants, where, pending the contract, defendants gave notice to the plaintiffs not to make or deliver any more, and refused to accept them: Cort v. *Ambergate Ry. Co.* 20 L. J. Q. B. 460.

Vendor against Purchaser on a Contract for the Sale of Goods delivered subject to Approval, for not paying for or redelivering them (*a*).

That in consideration that the plaintiff would deliver to the defendant certain goods of the plaintiff on sale or return, the defendant promised the plaintiff that he, the defendant, would purchase the same at the price of £—— and pay the plaintiff for the same, or would redeliver them to the plaintiff within a reasonable time; and the plaintiff delivered the said goods to the defendant, and the defendant received the same for the purpose and on the terms aforesaid, and a reasonable time for the defendant's purchasing and paying for

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(*a*) The common count for goods sold and delivered will in general lie in this case. (*Beverley* v. *Lincoln Gas Co.,* 6 A. & E. 829; *Moss* v. *Sweet,* 20 L. J. Q. B. 167; and see *ante,* 31 n. (*a*).)

or redelivering the said goods to the plaintiff as aforesaid elapsed; yet the defendant has not purchased and paid for the same as aforesaid, nor redelivered the same to the plaintiff.

Purchaser against Vendor for not delivering Goods sold (a).

That the defendant bargained and sold to the plaintiff, and the plaintiff bought of the defendant, certain goods [*or*, —— sacks of flour], at the price of £—— [*or* £—— per sack], to be delivered by the defendant to the plaintiff in a week then next following, and to be paid for by the plaintiff on delivery; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to the delivery of the said goods as aforesaid; yet the defendant did not deliver the said goods [*or*, sacks of flour] to the plaintiff; whereby the plaintiff has been deprived of the profits which would have accrued to him from the delivery of the same.

Like counts: Ramsden v. *Gray*, 7 C. B. 961; *Wood* v. *Tassell*, 6 Q. B. 234; *Porritt* v. *Baker*, 10 Ex. 759.

(*a*) In an action for not delivering goods under a contract of sale, the measure of damages is the difference between the contract price and the market price, at the time appointed for delivery. (*Gainsford* v. *Carroll*, 2 B. & C. 625; *Startup* v. *Cortazzi*, 2 C. M. & R. 165; *Barrow* v. *Arnaud*, 8 Q. B. 595, 609; *Josling* v. *Irvine*, 30 L. J. Ex. 78; 6 H. & N. 512.) The vendor cannot, by giving previous notice of his intention not to deliver the goods, diminish the purchaser's claim for damages, unless the latter consents to rescind the contract upon such notice. (*Leigh* v. *Paterson*, 8 Taunt. 540; and see *Phillpotts* v. *Evans*, 5 M. & W. 475.)

Where there is no difference between the contract price and the market price the damages are only nominal. (*Valpy* v. *Oakeley*, 16 Q. B. 941.) Where goods were paid for by bill, and after a breach of contract by the vendor in not delivering the goods, the bill was dishonoured, the purchaser was held entitled to recover only nominal damages. (*Griffiths* v. *Perry*, 1 El. & El. 680; 28 L. J. Q. B. 204.)

Where the property in the goods has passed under the contract, but the price has not been paid, and the vendor has wrongfully converted and disposed of the goods so as to preclude himself from delivering them and recovering the price, the vendee can only recover the difference between the value of the goods and the contract price, and cannot recover the full value by suing for the conversion of the goods instead of for the breach of contract (*Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J. Ex. 180); but if the vendor wrongfully retakes the goods after delivery, the vendee may recover the full value in an action of trespass or trover, the vendor having his remedy for the price. (*Gillard* v. *Brittan*, 8 M. & W. 575; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320.)

By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 2, it is provided "that in actions for breach of contract to deliver specific goods for a price in money, the jury shall, on the application of the plaintiff and by leave of the judge, find what the goods to be delivered are, what the plaintiff would have to pay for them, what damages he would have sustained if they should be delivered under execution, and what damages if not so delivered; and that the court or a judge shall have power to order execution to issue for the delivery, on payment of the price found by the jury, of the goods, without giving the defendant the option of retaining the same upon paying the damages assessed," etc. This section is to be first taken advantage of at the trial, and its provisions do not affect the form of the declaration.

For not delivering goods agreed to be delivered as required: *Jones* v. *Gibbons*, 8 Ex. 920.

On a contract for sale of timber to be delivered at a foreign port, for not delivering: *Gabriel* v. *Dresser*, 15 C. B. 622.

For not delivering goods sold by auction: *Salter* v. *Woollams*, 2 M. & G. 650.

For not delivering goods paid for by bill: *Griffiths* v. *Perry*, 28 L. J. Q. B. 204; 1 El. & El. 680.

On a sale of growing timber by public auction, for not permitting plaintiff to carry it away: *Lewis* v. *Clifton*, 14 C. B. 245.

For not delivering the residue after delivery of part of goods under a contract of sale: *Bentley* v. *Dawes*, 9 Ex. 666.

For not delivering goods on certain days, with a statement of special damage arising from the breach of a subcontract to deliver them to a third person: *Josling* v. *Irvine*, 30 L. J. Ex. 78; 6 H. & N. 512.

On a contract for the sale and delivery of slaves in a foreign country, for not delivering them: *Santos* v. *Illidge*, 8 C. B. N. S. 861.

Purchaser against Vendor on a contract for the Sale of Goods expected by a certain Ship, for not delivering.

That it was agreed by and between the plaintiff and the defendant, that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy of the defendant, —— tons of Petersburg hemp, expected to arrive at —— by the ship ——, at the price of £—— per ton from the quay, and on the terms that if the ship should be lost or the hemp should be damaged on the voyage the said agreement should be considered void for such quantities as might be lost or damaged, the quality to be of fair average of the season, and payment to be made by the plaintiff by six months' acceptance or cash in fourteen days less two and a half per cent. discount at the plaintiff's option; and after the making of the said contract, the said ship arrived at —— aforesaid with —— tons of the said hemp on board not damaged, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to the delivery of the lastmentioned goods as aforesaid; yet the defendant did not deliver to the plaintiff the said —— tons of the said hemp.

Like counts: *Moore* v. *Campbell*, 10 Ex. 323; *Fischel* v. *Scott*, 15 C. B. 69.

Like counts on contracts for the sale of goods "on arrival by a certain ship:" *Boyd* v. *Siffkin*, 2 Camp. 326; *and see Hayward* v. *Scougall*, 2 Camp. 56; *Splidt* v. *Heath*, 2 Camp. 57, *n.* "*On arrival before a certain day:*" *Idle* v. *Thornton*, 3 Camp. 274; "*to arrive by a certain ship:*" *Lovatt* v. *Hamilton*, 5 M. & W. 639; *Johnson* v. *Macdonald*, 9 M. & W. 600. [*In all the above cases the contracts were held to be conditional on the arrival of the ship with the goods.*]

Like counts on contracts for the sale of goods "now on passage, and expected to arrive by a certain ship:" *Gorissen* v. *Perrin*, 27 L. J. C. P. 29; 2 C. B. N. S. 681; "*to be delivered on the safe arrival of a certain ship:*" *Hale* v. *Rawson*, 27 L. J. C. P. 189; 4 C. B. N. S. 85. [*In these cases the contracts to deliver were held absolute on the arrival of the ship, although without the goods on board.*]

Count on a contract of sale of 500 tons of nitrate of soda to form the full cargo of a ship named, for delivering only the cargo, being less than the quantity: Bourne v. *Seymour*, 16 C. B. 337.

Purchaser against Vendor on a Sale of Goods sold by description, for delivering Goods inferior to the Description (a).

That it was agreed by and between the plaintiff and the defendant, that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy and accept from the defendant, —— sacks of flour of the same quality as certain flour which the defendant had then lately sold and delivered to *G. H.*, at the price of —— shillings per sack; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have such flour delivered as aforesaid; yet the defendant delivered to the plaintiff, as and for the flour so agreed to be sold and delivered as aforesaid, certain flour not of the same quality as the flour which he had so sold and delivered to the said *G. H.*, but of an inferior quality; whereby the plaintiff lost the price paid by him to the defendant for the said flour, and the profits which he would have derived from the performance of the said agreement by the defendant.

Like counts: Harnor v. *Groves*, 15 C. B. 667; *Loder* v. *Kekulé*, 3 C. B. N. S. 128; *Ramsden* v. *Gray*, 7 C. B. 961; *St. Losky* v. *Green*, 30 L. J. C. P. 19; 9 C. B. N. S. 370. *And see post*, "*Warranty*," p. 231.

Purchaser against Vendor for not delivering a Machine within a Time agreed upon, stating special Damage (b).

That it was agreed by and between the plaintiff and the defen-

(*a*) As to the measure of damages in this action, see *post*, "*Warranty*."

(*b*) In *Fletcher* v. *Tayleur*, 25 L. J. C. P. 65; 17 C. B. 21, it was suggested by the court that the measure of damages for the breach of a contract to deliver a chattel, should be governed by a rule similar to that which governs the measure of damages for the breach of a contract to pay money. In the latter case, whatever may be the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of money only; and it might be convenient if the measure of damages in the former case were, by analogy, fixed to the average profit made by the use of such a chattel. Accordingly, in an action for the non-delivery of a ship at the time contracted for, the difference between the probable earnings of the ship, if delivered at the time contracted for, and the actual earnings when delivered, was held to be a correct measure of damages. (*Ib.*)

The rule was laid down in *Hadley* v. *Baxendale*, 9 Ex. 341, that such damages only are recoverable as may fairly and reasonably be considered as arising naturally, *i. e.* according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Accordingly, in an action by the owner of a mill, against a carrier for delay in delivering machinery, which prevented him from working his mill, the plaintiff was not allowed to recover as special damage the loss occasioned by the stoppage. (*Hadley* v. *Baxendale, supra*: the same rule was adopted in the cases of *Fletcher*

dant, that the plaintiff should buy of the defendant a threshing-machine, and that the defendant should sell and deliver the same to the plaintiff on or before the —— day of ——, A.D. ——; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to a delivery of the said threshing-machine as aforesaid; yet the defendant did not deliver the said threshing-machine to the plaintiff on or before the said —— day of ——, A.D. ——; whereby the plaintiff was unable to thresh his wheat, and the same became damaged and wetted by the rain, and deteriorated in value, and the plaintiff incurred expense in drying and carting and stacking the same, and was unable to sell the same as soon or for so large a price as he otherwise would have done.

A like count: Smeed v. *Foord*, 28 L. J. Q. B. 178; 1 El. & El. 602.

Count for not delivering part of a machine, whereby the plaintiff was prevented from completing and delivering the whole machine according to a contract: Portman v. *Middleton*, 27 L. J. C. P. 231; 4 C. B. N. S. 322.

For not delivering an engine and boilers for a steam-vessel contracted to be delivered within two months: Wimshurst v. *Deeley*, 2 C. B. 253.

For not delivering iron girders within a reasonable time after the order was given: Kingdom v. *Cox*, 2 C. B. 661.

Counts on warranties on the sale of goods, see post, "*Warranty,*" *p.* 229.

Sale: II. Of Land.

Indebitatus Count for the Purchase-money of an Estate sold and conveyed, (C. L. P. Act, 1852, Sch. B. 7 (a).)

Money payable by the defendant to the plaintiff for a messuage and lands sold and conveyed by the plaintiff to the defendant.

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v. *Taylew*, 25 L. J. C. P. 65; *Smeed* v. *Foord*, 28 L. J. Q. B. 178; 1 El. & El. 602; and *Portman* v. *Middleton*, 4 C. B. N. S. 322.)

In an action for a breach of contract for the manufacture of a specific article to be delivered in a certain time, the article being necessary to enable the plaintiff to complete a contract with a third party, previously made, but of which the defendant had no notice, it was held that the plaintiff was entitled to recover the extra cost of getting another article, but not the compensation recovered against him for his breach of contract with the third party. (*Portman* v. *Middleton*, 4 C. B. N. S. 322; 27 L. J. C. P. 231.)

(*a*) An indebitatus count will lie to recover the purchase-money for land, etc. sold and conveyed where there has been an actual conveyance by deed of the land to the defendant; the mere act of giving possession would not be sufficient. (Statute of Frauds, 29 Car. II. c. 3, s. 1; 8 & 9 Vict. c. 106, s. 3.) In practice, such a count seldom occurs, and formerly could rarely have been sustained, because the deed of conveyance of the land generally contains a release of the purchase-money. (See per Parke, B., *Hallen* v. *Runder*, 1 C. M. & R. 271; and *Baker* v. *Dewey*, 1 B. & C. 704.) A plea

Indebitatus Count for a Copyhold Estate sold and surrendered.

Money payable by the defendant to the plaintiff for a copyhold or customary tenement, by the plaintiff sold to the defendant and surrendered to his use at his request.

Indebitatus Count for a Leasehold Estate sold and assigned.

Money payable by the defendant to the plaintiff for a messuage and lands sold and assigned by the plaintiff to the defendant for the remainder of a term of years to come and unexpired therein.

Indebitatus Count for the Premium on a Lease granted by the Plaintiff to the Defendant.

Money payable by the defendant to the plaintiff for a messuage and lands demised by the plaintiff to the defendant for a term of years then to come therein, and by the defendant accordingly entered upon and possessed for the said term.

Special counts for the purchase-money of land: Laird v. *Pim*, 7 M. & W. 474; *Wilks* v. *Smith*, 10 M. & W. 355. *On an agreement for the payment of the premium for a lease by instalments: Baggallay* v. *Pettit*, 28 L. J. C. P. 169; 5 C. B. N. S. 637.

On a covenant to pay the purchase-money contained in a contract of sale under seal: Matlock v. *Kinglake*, 10 A. & E. 50; *Poole* v. *Hill*, 6 M. & W. 835; *Sibthorp* v. *Brunel*, 3 Ex. 826. [*It was held in the last case that the covenants to pay the purchase-money and to convey the land were independent.*]

On a covenant in the deed of conveyance for the payment of the purchase-money by instalments: Foley v. *Fletcher*, 28 L. J. Ex. 100.

Vendor against Purchaser, on a Sale by Private Contract, for not completing the Purchase (*a*).

That by an agreement bearing date the —— day of ——, A.D.

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of release in such case might now be met by an equitable replication. When therefore, under a sale by simple contract, the vendor or assignor has actually done everything on his part by conveying, granting, assigning, or surrendering the premises (and has not merely been ready and willing to do so and been prevented by some breach or default on the defendant's part), the plaintiff may declare in this form and a special count is not necessary. In all other cases the plaintiff must declare specially.

By the Statute of Frauds, 29 Car. II. c. 3, s. 4, it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. (See the decisions on this section, 'Roscoe on Evidence,' 10th ed. 240.)

(*a*) In an action by the vendor against the purchaser for not completing the purchase, where the estate remains the property of the vendor, he

——, it was agreed by and between the plaintiff and the defendant, that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff, a messuage and land at the price of £——, upon the terms and conditions following, that is to say [*state the conditions material to the cause of action as follows*], that the defendant should pay the plaintiff a deposit of £—— in part of the said purchase-money on the signing of the said agreement, and the remainder on the —— day of ——, A.D. ——, on which day the said purchase should be completed; and that the plaintiff should deduce and make a good title to the said premises on or before the —— day of ——, A.D. ——, and on payment of the said remainder of the said purchase-money as aforesaid, should execute to the defendant a proper conveyance of the said premises, to be prepared at the defendant's expense; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part; yet the defendant did not pay the plaintiff the said remainder of the said purchase-money as aforesaid, nor complete the said purchase as aforesaid on his part; whereby the plaintiff has lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

Like counts on agreements to sell leases: Souter v. *Drake*, 5 B. & Ad. 992; *Hall* v. *Betty*, 4 M. & G. 410; *Wilson* v. *Wilson*, 14 C. B. 616.

Count for refusing to accept a lease under an agreement: De Medina v. *Norman*, 9 M. & W. 820; *Forster* v. *Rowland*, 30 L. J. Ex. 396; *Bond* v. *Rosling*, 1 B. & S. 371.

Count for not preparing a proper conveyance or paying the purchase-money: Thames Haven Dock Co. v. *Brymer*, 5 Ex. 696.

Vendor against Purchaser on a Sale by Auction for not completing the Purchase.

That the plaintiff, on the —— day of ——, A.D. ——, caused to be put up for sale by public auction a messuage and land upon and subject to the following, amongst other, conditions of sale [*state the conditions material to the cause of action as follows*], that the highest bidder should be the purchaser, and that the purchaser should pay the vendor a deposit of £—— per centum in part of the purchase-money immediately after the sale, and the remainder of the purchase-money on the —— day of ——, A.D. ——, on which day the purchase should be completed, and that the vendor should deduce and make a good title to the said premises, commencing with etc. [*according to the fact*], on or before the —— day of ——, A.D. ——, and that on payment of the remainder of the said purchase-money as aforesaid, the vendor should execute a conveyance of the said premises to the purchaser at the purchaser's expense, and that if the purchaser should fail to comply with the said conditions his

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is not entitled to claim the purchase-money, but the measure of damages is the loss sustained by him from the breach of contract, as the costs incurred and the diminution in value of the land. (*Laird* v. *Pim*, 7 M. & W. 474.)

said deposit should thereupon be forfeited, and the vendor should be at liberty to resell the said premises by public auction or private contract as he should think fit, and the deficiency, if any, in price and all expenses attending such resale should be paid by the purchaser to the vendor; and upon such putting up to sale of the said premises as aforesaid the defendant was the highest bidder for the same, and purchased the said premises from the plaintiff, and the plaintiff sold the same to the defendant for £—— upon and subject to the said conditions of sale; and the defendant then paid the plaintiff such deposit as aforesaid, and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breaches hereinafter mentioned; yet the defendant did not on the said —— day of ——, A.D. ——, pay the plaintiff the remainder of the said purchase-money, nor complete the said purchase on his part; whereby the plaintiff has been deprived of the advantages which would have accrued to him from the payment of the said remainder of the said purchase-money and from the completion of the said purchase, and has but the expenses incurred by him in preparing to complete the said purchase on his part and in endeavouring to procure the completion of the said purchase by the defendant; and afterwards, according to the said conditions of sale, the plaintiff resold the said premises by public auction for a less sum than the price aforesaid, and there was a deficiency in price on such resale of £——, and the expenses attending such resale amounted to £——, of all which the defendant had notice, but did not pay the last-mentioned sums or either of them to the plaintiff.

Like counts: Ferry v. *Williams*, 8 Taunt. 62; *Laythoarp* v. *Bryant*, 1 Bing. N. C. 421; *Dobson* v. *Espie*, 26 L. J. Ex. 240; 2 H. & N. 79.

A like count, charging a breach in not paying the deposit, which had become forfeited: Ockenden v. *Henly*, 27 L. J. Q. B. 361.

Vendor against Purchaser on an Agreement to assign a Public House, with Goodwill, Fixtures, and Stock in Trade, for not completing.

That the plaintiff was possessed of a messuage and premises for the residue of a term of years, and carried on the business of a seller of beer upon the said premises, and was also possessed of certain household goods, fixtures, and fittings, and of beer and other licenses, and of stock in trade and effects concerning his said business then being on the said premises; and thereupon, by an agreement bearing date the —— day of ——, A.D. ——, it was agreed by and between the plaintiff and the defendant as follows, that is to say [*set out the agreement for the assignment of the lease, fixtures, stock in trade, goodwill, etc., and other material parts according to the fact*]. And all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part; yet the defendant [*state the breaches according to the fact*]; whereby the plaintiff has lost the advantages which would have accrued to him from the completion of the said agreement, and the expense which he has incurred in preparing papers and writings and paying brokers' and valuers'

charges and otherwise in preparing to perform the said agreement on his part.

Like counts: Marylam v. *Norris*, 2 D. & L. 829; *Wilson* v. *Wilson*, 14 C. B. 616.

Vendor against the Purchaser of the Benefit of a Contract for the Purchase of a House.

That the plaintiff had bargained and agreed with *G. H.* for the purchase by the plaintiff from the said *G. H.* of a freehold house, to be conveyed by the said *G. H.* to the plaintiff at the price of £——; and thereupon, in consideration that the plaintiff would sell and give up to the defendant the said bargain and agreement and the benefit thereof, and would permit the defendant instead of the plaintiff to become the purchaser of the said house from the said *G. H.*, the defendant promised the plaintiff to pay him £—— for the giving up of the said bargain and agreement and of the benefit thereof to the defendant, on the said house being conveyed to him instead of the plaintiff on the terms of the said bargain; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £—— by the defendant; yet the defendant has not paid the same. [*An indebitatus count would be sufficient, but inconvenient in form.*]

A like count: Price v. *Seaman*, 4 B. & C. 525.

Vendor against Purchaser on the Sale of an Agreement for a Lease (a).

That the plaintiff was possessed of a house as tenant thereof to *G. H.*, and had entered into an agreement with the said *G. H.*, whereby the said *G. H.* agreed with the plaintiff to grant to him or his assigns a lease of the said house for a certain term of years; and thereupon, in consideration that the plaintiff promised the defendant to sell to the defendant his said agreement and the benefit thereof for the price of £——, the defendant promised the plaintiff to purchase from him the said agreement and the benefit thereof, and to pay the plaintiff the said price of £—— for the same; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £—— by the defendant; yet the defendant has not paid the plaintiff the same.

A like count: Kintrea v. *Perston*, 1 H. & N. 357; 25 L. J. Ex. 287.

Count on an agreement to pay a sum of money in consideration of

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(*a*) In every contract for the sale of a lease, unless there be a stipulation to the contrary, there is an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity. (*Souter* v. *Drake*, 5 B. & Ad. 992; *Hall* v. *Betty*, 4 M. & G. 410; *White* v. *Foljambe*, 11 Ves. 337; *Ogilvie* v. *Foljambe*, 3 Mer. 53.) But in a contract for the sale of an agreement for a lease, in the absence of express stipulation, there is no such implied undertaking that the proposed lessor has a good title to grant the lease, and the purchaser is entitled only to the rights under the agreement. (*Kintrea* v. *Perston*, 25 L. J. Ex. 287; 1 H. & N. 357.)

the plaintiff having surrendered his lease, and induced the landlord to take the defendant as tenant: Cocking v. *Ward*, 1 C. B. 858.

Purchaser against Vendor on a Sale by private Contract for not Completing (a).

That by an agreement, bearing date the —— day of ——, A.D. ——, it was agreed by and between the plaintiff and the defendant that the defendant should sell to the plaintiff, and the plaintiff should purchase from the defendant a messuage and land at the price of £——, upon the terms and conditions following, that is to say, [*state the conditions material to the cause of action, as follows:*] that the plaintiff should pay the defendant a deposit of £——, in part of the

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(*a*) Where the contract is rescinded the purchaser may recover the deposit on a count for money received (see *ante*, p. 40; *Simmons* v. *Heseltine*, 28 L. J. C. P. 129; and see *Blackburn* v. *Smith*, 2 Ex. 783.) But if the purchaser makes default, and by the terms of the contract the deposit is forfeited, he cannot recover it. (*Beavan* v. *M'Donnell*, 9 Ex. 309.)

In an action by the purchaser against the vendor for not completing the purchase, the purchaser can claim as damages the costs of preparing and entering into the agreement, and the costs of investigating the title, and of endeavouring to procure a good title (*Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492; *Hanslip* v. *Padwick*, 5 Ex. 615); and it is sufficient if these costs have been incurred, though not paid before action (*Richardson* v. *Chasen*, 10 Q. B. 756), if properly laid in the declaration, (*Ib.*: and see *Pritchet* v. *Boevey*, 1 C. & M. 775.) He may also claim interest on the deposit money. (*Hodges* v. *Earl of Litchfield*, *supra*.) He cannot claim the costs of raising the purchase money in readiness for payment, nor the interest on it while lying idle. (*Hanslip* v. *Padwick*, *supra*; but as to the interest see *Sherry* v. *Oke*, 3 Dowl. 349.) He cannot claim the costs of a chancery suit brought by him against the defendant for specific performance, and dismissed for defect of the defendant's title (*Malden* v. *Fyson*, 11 Q. B. 292); nor the extra costs of a chancery suit brought against him by the defendant, and dismissed with costs. (*Hodges* v. *Earl of Litchfield*, *supra*.) Expenses incurred before entering into the contract cannot be claimed. (*Ib.*)

The purchaser cannot claim damages for the loss of his bargain, where the vendor fails to complete by reason of a defect in his title, provided the vendor acted *bonâ fide*, and had reasonable ground for supposing that he had a good title. (*Flureau* v. *Thornhill*, 2 Bl. 1078; *Pounsett* v. *Fuller*, 17 C. B. 660; 25 L. J. C. P. 145; *Sikes* v. *Wild*, 30 L. J. Q. B. 325; 1 B. & S. 587.) But where the vendor contracts to sell an estate, knowing at the time that he has no title, he is liable to make good the loss of the bargain. *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Robinson* v. *Harman*, 1 Ex. 850.) So also if he fails to complete from any other cause than defect of title. (See per Campbell, C. J., *Simons* v. *Patchett*, 7 E. & B. 568, 572.)

In *Boyman* v. *Gutch*, 7 Bing. 379, it was held that the capacity of the vendor to make a good title depended upon whether he had a legal title to convey, and not upon whether a court of equity would compel the purchaser to take the title. But in *Jeakes* v. *White*, 6 Ex. 873, in which *Boyman* v. *Gutch* was not cited, it was held (Martin, B., *dissentiente*), that a good title meant such a title as a court of equity would adopt as sufficient ground for compelling specific performance; and in that case, a title which depended on a doubtful fact respecting heirship, was held bad. In *Simmons* v. *Heseltine*, 5 C. B. N. S. 554; 28 L. J. C. P. 129, a title depending on a doubtful question of fact was held bad, and the plaintiff recovered his deposit and expenses; (and see *Stevens* v. *Austen*, 30 L. J. Q. B. 212.)

said purchase-money on the signing of the said agreement, and the remainder on the —— day of ——, A.D. ——, on which day the said purchase should be completed, and that the defendant should deduce and make a good title to the said premises on or before the —— day of ——, A.D. ——, and on payment of the said remainder of the said purchase-money as aforesaid should execute to the plaintiff a proper conveyance of the said premises, to be prepared at the plaintiff's expense; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part; yet the defendant did not execute to the plaintiff such conveyance as aforesaid, nor complete the said purchase as aforesaid on his part; whereby the plaintiff has lost the use of the money paid by him as such deposit as aforesaid, and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant, and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant.

Like counts: Hughes v. *Parker*, 8 M. & W. 244; *Rippinghall* v. *Lloyd*, 5 B. & Ad. 742.

A like count, where, before the time for the completion of the contract, the defendant had conveyed to another person: Lovelock v. *Franklyn*, 8 Q. B. 371.

Purchaser against Vendor on a Sale by private Contract for not delivering an Abstract of Title.

That by an agreement, bearing date the —— day of ——, A.D. ——, it was agreed by and between the plaintiff and the defendant that the defendant should sell to the plaintiff, and the plaintiff should purchase from the defendant the manor of —— at the price of £——, and that the defendant should within —— weeks from the date of the said agreement deliver to the plaintiff or his solicitor a proper and sufficient abstract of the defendant's title to the said manor, and that he should on the —— day of ——, A.D. ——, on receiving the said purchase-money, execute a proper conveyance of the said manor to the plaintiff; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have such abstract as aforesaid delivered to him or to his solicitor; yet the defendant did not within —— weeks from the date of the said agreement deliver to the plaintiff or his solicitor a proper and sufficient or any abstract of the defendant's title to the said manor.

Like counts: Hodges v. *Earl of Litchfield*, 1 Bing. N. C. 492; *Metcalfe* v. *Fowler*, 6 M. & W. 830; *Montagu* v. *Kater*, 8 Ex. 507; *Orme* v. *Broughton*, 10 Bing. 533.

Purchaser against Vendor on a Sale by Auction for not making a good Title.

That the defendant, on the —— day of ——, A.D. ——, caused to be put up for sale by public auction a messuage and land, upon and

subject to the following, amongst other conditions of sale, [*state the conditions material to the cause of action, as follows:*] that the highest bidder should be the purchaser, and that the purchaser should pay the vendor a deposit of £—— per cent. in part of the purchase-money immediately after the sale, and the remainder of the purchase-money on the —— day of ——, A.D. ——, on which day the said purchase should be completed, and that the vendor should deduce and make a good title to the said premises, commencing with [*etc., according to the fact*], on or before the —— day of ——, A.D. ——, and that on payment of the remainder of the said purchase-money as aforesaid the vendor should execute a conveyance of the said premises to the purchaser at the purchaser's expense; and upon such putting up of the said premises to sale as aforesaid the plaintiff was the highest bidder for the same, and purchased the said premises from the defendant, and the defendant sold the same to the plaintiff for £——, upon and subject to the said conditions of sale; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have such good title to the said premises as aforesaid deduced and made by the defendant; yet the defendant did not on or before the said —— day of ——, A.D. ——, deduce or make such good title to the said premises as aforesaid, whereby the plaintiff has lost the expenses incurred by him in investigating the title of the defendant to the said premises and in endeavouring to procure the performance of the said agreement by the defendant, and has lost the use of the money paid by him as such deposit as aforesaid, and of other moneys provided and kept by him for the completion of the said purchase.

Like counts: Sansom v. *Rhodes*, 6 Bing. N. C. 261; *Ballard* v. *Way*, 1 M. & W. 520; *Simmons* v. *Heseltine*, 28 L. J. C. P. 129; 5 C. B. N. S. 554.

Counts for not delivering an abstract of title according to the conditions of sale: Wilde v. *Fort*, 4 Taunt. 334; *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Smith* v. *Tanner*, 1 M. & G. 802; *Skarland* v. *Leifchild*, 4 C. B. 529.

Count upon an agreement to assign a lease, for not furnishing a proper title: Penniall v. *Harborne*, 11 Q. B. 368.

For breach of an agreement to grant a lease, stating special damage in having fitted up the premises as a beershop, and the loss of a bargain to sell the lease: Hayward v. *Parke*, 16 C. B. 295.

On a contract by a vicar to let the glebe lands, for a breach by resigning the vicarage: Price v. *Williams*, 1 M. & W. 6.

By the devisee of the grantee on the covenant in a deed of conveyance that the vendor was seised in fee, and had a right to convey: Kingdon v. *Nottle*, 4 M. & S. 53.

By the heir of the grantee on the covenant for further assurance: Jones v. *King*, 4 M. & S. 188.

By the assignee against the assignor of a term on a covenant that the term was subsisting: Stannard v. *Forbes*, 6 A. & E. 572.

Schoolmaster.

Indebitatus Count by a Schoolmaster for Tuition, Board, etc.

Money payable by the defendant to the plaintiff for work done by the plaintiff, as a schoolmaster, in and about the instructing of *G. H.* for the defendant and at his request, and for meat, drink, washing, lodging, books, and other necessaries and goods provided by the plaintiff for the said *G. H.* at the request of the defendant.

By a Schoolmaster for Removing a Pupil without a Quarter's Notice (a).

That in consideration that the plaintiff, as and being a schoolmaster, would receive *G. H.* into the school of the plaintiff and provide him with education, board, and lodging, whilst he should be at such school, for reward to the plaintiff at the rate of £—— per annum, payable quarterly, the defendant promised the plaintiff to continue the said *G. H.* at the said school, to be educated, boarded, and lodged by the plaintiff as aforesaid, until the expiration of a quarter of a year's notice to be given to the plaintiff by the defendant of his intention to take the said *G. H.* away from the said school [or to pay the plaintiff a proportionate part of the said sum for a quarter of a year]; and the plaintiff received the said *G. H.* into the said school, and provided him with education, board, and lodging, whilst he was at the said school, on the terms aforesaid, and the plaintiff has always been ready and willing to continue to do so, whereof the defendant had notice; yet the defendant did not continue the said *G. H.* at the said school until the expiration of a quarter of a year's notice as aforesaid [nor pay the plaintiff a proportionate part of the said sum for a quarter of a year], and wrongfully took away the said *G. H.* from the said school without giving the plaintiff any such notice [or making such payment] as aforesaid; whereby the plaintiff has lost the profits which he would have derived from the performance of the said promise by the defendant.

A like count: Collins v. *Price*, 5 Bing. 132.

Seaman.

Indebitatus Count by a Seaman for Wages (b).

Money payable by the defendant to the plaintiff for the work and

(a) Upon a contract similar to that stated in this count, it was held that the payments accrued due quarterly, and therefore, the defendant having become bankrupt pending a quarter, his bankruptcy was no defence to the whole or any part of the claim of the plaintiff in respect of the quarter. (*Hopkins* v. *Thomas*, 7 C. B. N. S. 711; 29 L. J. C. P. 187.)

(b) By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 188, it is enacted, "that any seaman or apprentice, or any person duly authorized on his behalf, may sue in a summary manner, before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, or in Scotland either before any such justices or before the sheriff of the county within

services of the plaintiff, by him done and rendered, as a hired seaman and mariner on board the ship ——, for the defendant at his request, and for wages due from the defendant to the plaintiff in respect thereof.

Like counts: Frazer v. *Hatton*, 2 C. B. N. S. 512; *Melville* v. *De Wolf*, 4 E. & B. 844; *Robins* v. *Power*, 27 L. J. C. P. 257.

Count on a seaman's advance note: M'Kune v. *Joynson*, 28 L. J. C. P. 133; 5 C. B. N. S. 218.

Shares.

Indebitatus Count for the Price of Shares sold.

Money payable by the defendant to the plaintiff for —— shares, in an undertaking called the —— Company, sold and transferred by the plaintiff to the defendant.

By Vendor of Shares against Purchaser for not Accepting (*a*).

That in consideration that the plaintiff would sell to the defendant

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which any such place is situated, for any amount of wages due to such seaman or apprentice, not exceeding £50 over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final."

By s. 189, "no suit or proceeding for the recovery of wages under the sum of £50, shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any superior Court of Record in Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

Where the declaration contained a count for wages, as a seaman, under £50, and a count for an assault, the court allowed a plea to be pleaded to the former count that the action was brought for the recovery of wages under £50 within the above section. (*Rossi* v. *Grant*, 5 C. B. N. S. 699.)

A seaman cannot sue the master of the vessel for his share of salvage, although the total amount of salvage has been paid to the master and is in his hands. (*Atkinson* v. *Woodall*, 31 L. J. M. 174.)

(*a*) In an action for not accepting shares under a contract of sale, the measure of damages is the difference between the contract price and the price at the time appointed for acceptance, or upon a re-sale if re-sold by the vendor within a reasonable time after the breach. (*Stewart* v. *Cauty*, 8 M. & W. 160.)

By the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 20, it is enacted, "that the transfer of any share in the company shall be in the form marked F. in the schedule thereto, or to the like effect, and shall be executed both by the transferror and transferree: the transferror shall be deemed to remain a holder of such share until the name of the transferree is entered in the register-book in respect thereof."

By s. 66, it is enacted, "that for the purpose of ascertaining the liability

—— shares in the ——Company at the price of £—— per share, and would do all things necessary on the plaintiff's part to transfer the said shares to the defendant on the —— day of —— then next, the defendant promised the plaintiff that he would at the time aforesaid accept the transfer of the said shares, and do all things necessary on his part in that behalf, and pay the said price for the same upon the transfer thereof; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said promise of the defendant performed by him; yet the defendant did not accept the transfer of the said shares, nor do all things necessary on his part in that behalf, nor pay the said price for the same.

Like counts: Hare v. *Waring*, 3 M. & W. 362; *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; *Stewart* v. *Cauty*, 8 M. & W. 160; *Field* v. *Lelean*, 30 L. J. Ex. 168; 6 H. & N. 617.

Count by a vendor of shares against the purchaser on an implied indemnity against calls paid by the plaintiff in consequence of the defendant not having transferred the shares into his name in the books of the company: Walker v. *Bartlett*, 25 L. J. C. P. 156, 263; 17 C. B. 446; 18 C. B. 845; *see ante*, "*Indemnity*," p. 153.

By Purchaser of Shares against Vendor for not transferring (a).

That in consideration that the plaintiff would buy from the defendant —— shares in the —— Mine at the price of £—— per share, to be paid by the plaintiff to the defendant, and would accept a transfer of the said shares from the defendant, the defendant promised the plaintiff that he would sell the said shares to the plaintiff, and within a reasonable time in that behalf transfer and do all things necessary on his part to transfer the said shares to the plaintiff; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said promise of the defendant performed by him; yet the defendant did not transfer, nor do all things necessary on his part to transfer the said shares to the plaintiff; whereby the plaintiff lost the profits which he would have derived from having the said shares transferred to him, and incurred expense in purchasing other shares in the said mine in lieu thereof.

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of existing and former shareholders as between themselves, the following rule shall be adopted: (that is to say)—

1. In the case of a company other than a limited company, every transferree of shares shall, in a degree proportioned to the shares transferred, indemnify the transferror against all existing and future debts of the company:
2. In the case of a limited company every transferree shall indemnify the transferror against all calls made or accrued due on the shares transferred subsequently to the transfer."

(*a*) The measure of damages upon the breach of a contract of sale of shares, for not delivering or transferring, is the difference between the contract price and the market price when the contract was broken, allowing the purchaser a reasonable time for the purchase of like shares. (*Shaw* v. *Holland*, 15 M. & W. 136; *Tempest* v. *Kilner*, 3 C. B. 253.)

Like counts: Powell v. *Jessopp*, 18 C. B. 336; *Tempest* v. *Kilner*, 2 C. B. 300; *Stephens* v. *De Medina*, 4 Q. B. 422; *Watson* v. *Spratley*, 10 Ex. 222; *Stray* v. *Russell*, 28 L. J. Q. B. 279.

By the owner of foreign mining shares delivered to the defendant on loan, for not redelivering them: Owen v. *Routh*, 14 C. B. 327 (*a*).

A like count on a loan of railway shares: Deacon v. *Gridley*, 15 C. B. 295.

Actions for calls on shares: see "Company," ante, p. 119.

Mandamus against a company to register shares: see "Mandamus," post, ch. 3.

Sheriff.

Indebitatus Count by a Sheriff for Fees, etc.

Money payable by the defendant to the plaintiff for work done by the plaintiff as sheriff of the county of ——, and by his bailiffs, officers, and servants for the defendant at his request, and for fees payable by the defendant to the plaintiff in respect thereof.

Like counts: Maybery v. *Mansfield*, 9 Q. B. 754; *Walbank* v. *Quarterman*, 3 C. B. 94; *Newton* v. *Chambers*, 1 D. & L. 869.

Indebitatus count for sheriff's poundage on a writ of elegit: Carter v. *Hughes*, 2 H. & N. 714; 27 L. J. Ex. 225.

Indebitatus count against a sheriff for the money levied under a writ: see "Money Received," ante, p. 36 n. (*a*).

Counts against Sheriffs for Penalties under 32 *Geo. II. c.* 28, *ss.* 1–12.

For carrying the plaintiff to prison within twenty-four hours after arrest: Silk v. *Humphery*, 4 A. & E. 959; *Dewhirst* v. *Pearson*, 1 Dowl. 664; *Gordon* v. *Laurie*, 9 Q. B. 60; *Summers* v. *Moseley*, 2 C. & M. 477.

For extortion in taking an excessive fee: Martin v. *Bell*, 6 M. & S. 220; *Plevin* v. *Prince*, 10 A. & E. 494.

Against the sheriff for penalties under 23 *H. VI. c.* 9, *for not accepting bail: Evans* v. *Moseley*, 2 C. & M. 490.

Against sheriffs for penalties under 29 *Eliz. c.* 4, *for taking excessive fees for the execution of a writ of fi. fa.: Ashby* v. *Harris*,

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(*a*) On a contract to replace stock or shares on a given day which have been lent by the plaintiff to the defendant, the measure of damages is the price at the time appointed by the contract for replacing the stock or shares, or the price at the day of the trial, at the option of the plaintiff. (*Shepherd* v. *Johnson*, 2 East, 211; *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257; *Owen* v. *Routh*, 14 C. B. 327; and see *Gainsford* v. *Carroll*, 2 B. & C. 625; *Shaw* v. *Holland*, 15 M. & W. 136, 145.)

2 M. & W. 673; *Usher* v. *Walters*, 4 Q. B. 553; *Pilkington* v. *Cooke*, 4 D. & L. 347; *Holmes* v. *Sparkes*, 12 C. B. 242.

Shipping.

See "*Carriers by Water*," *ante*, p. 109; "*Charterparty*," *ante*, p. 116; "*Seaman*," *ante*, p. 222.

Stock.

Indebitatus Count for Stock sold and transferred.

Money payable by the defendant to the plaintiff for £—— 3 per cent. Consolidated Bank Annuities [*or as the case may be*], sold and transferred by the plaintiff to the defendant.

Count on a bond conditioned to replace stock advanced: Blair v. *Ormond*, 20 L. J. Q. B. 444; *and see* "*Shares*," *ante*, p. 223.

Surety. *See* "*Guarantee*," *ante*, p. 137.

Tolls (*a*).

Indebitatus Count for Tolls on passing through a Turnpike.

Money payable by the defendant to the plaintiff for tolls due from the defendant to the plaintiff, as and being the farmer and collector of the tolls payable at a turnpike-gate erected on a turnpike-road, for the passage of cattle and carriages of the defendant through the said gate.

Indebitatus Count for Tolls on passing over a Bridge.

Money payable by the defendant to the plaintiff for tolls due from the defendant to the plaintiff for the passage of waggons and carts of the defendant over a bridge of the plaintiff.

For tolls in respect of goods landed at a port: Bradley v. *Newcastle*, 2 E. & B. 427; *Jenkins* v. *Treloar*, 1 M. & W. 19; *Earl Falmouth* v. *Penrose*, 6 B. & C. 385.

For tolls due under a statute in respect of coals carried on a river: Ribble Navigation Co. v. *Hargreaves*, 17 C. B. 385.

For tonnage on canals, see ante, p. 110.

(*a*) The county courts have no jurisdiction in any action in which the title to any toll, fair, market, or franchise shall be in question. (9 & 10 Vict. c. 95, s. 58, except by agreement of the parties, 19 & 20 Vict. c. 108, s. 23.)

Count for rent on a demise of tolls by the trustees of a turnpike-road: Olroyd v. *Crampton*, 4 Bing. N. C. 24.

Indebitatus Count for Rates for the Use of a Railway.

Money payable by the defendant to the plaintiffs for rates and tolls due from the defendant to the plaintiffs for the tonnage of goods carried by them for the defendant at his request upon a railway of the plaintiffs.

By one Railway Company against another, for the Hire and Use of a Railway and Stock.

Money payable by the defendants to the plaintiffs for the defendants' use by the plaintiffs' permission of railways, roads, lands, stations, messuages, buildings, works, carriages, rolling-stock, and goods of the plaintiffs, and for the carriage of passengers, horses, cattle, sheep, carriages, and other goods and merchandise, carried by the plaintiffs for the defendants at their request on railways of the plaintiffs, and for tolls, tonnage, dues, and charges payable by the defendants to the plaintiffs in respect of the premises. [*This count would not be applicable if the contract between the companies was under seal.*]

A special count on a covenant by one railway company to pay tolls for the use of the railway of another company: South Yorkshire Ry. Co. v. *Gt. Northern Ry. Co.*, 9 Ex. 55.

Indebitatus Count for Tolls on Cattle sold in a Market.

Money payable by the defendant to the plaintiff for tolls due from the defendant to the plaintiff, as and being the owner [*or* farmer] of a market and of the tolls and duties thereunto belonging, for cattle by the defendant brought into the said market and therein sold by him.

Indebitatus count for tolls for vegetables, etc., sold in Covent Garden Market: Duke of Bedford v. *Emmett*, 3 B. & Ald. 366.

For tolls of wheat, etc., payable in a market: Mayor of Reading v. *Clarke*, 4 B. & Ald. 268.

Indebitatus Count for Stallage.

Money payable by the defendant to the plaintiff for stallage due from the defendant to the plaintiff as and being the owner [*or* farmer] of a market and market-place, and of the stallage and other profits and privileges thereto belonging, for and in respect of the defendant having erected in the said market and market-place stalls and stands for the purpose of exposing to sale cattle and goods therein, and of the defendant having exposed to sale therein cattle and goods in the said market and market-place.

Like counts: Lockwood v. *Wood*, 6 Q. B. 31; *Mayor of Newport* v. *Saunders*, 3 B. & Ad. 411.

Trade.

Indebitatus Count for the Price of the Goodwill of a Trade.

(*C. L. P. Act*, 1852, *Sched. B.* 8 (*a*).)

Money payable by the defendant to the plaintiff for the goodwill of a business of the plaintiff sold and given up by the plaintiff to the defendant.

Special Count for the Price of the Goodwill of a Trade.

That the plaintiff was possessed of certain premises, where he carried on the business of a —— within a district extending over a reasonable distance from the said premises, and was also possessed of certain stock-in-trade and plant used in the said business; and thereupon in consideration that the plaintiff would yield up the possession of the said premises to the defendant, and would assign over and deliver to the defendant the said stock-in-trade and plant, and would retire from the said business and permit the defendant to carry on the said business within the said district in the plaintiff's stead, the defendant promised the plaintiff to pay the plaintiff £——; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said £——; yet the defendant has not paid the same.

A like count: Smart v. *Harding*, 15 C. B. 652.

On a Promise upon the Sale of a Goodwill not to carry on the Trade in the same Place.

That the defendant carried on the business of a —— at ——, in the county of ——; and in consideration that the plaintiff would purchase from the defendant his house and premises at —— aforesaid for £——, and his household furniture and stock-in-trade there at a valuation, and would pay the defendant £—— as a premium for the goodwill of the said business so carried on by him, the defendant promised the plaintiff that he would not at any time thereafter, by himself or any partner or agent or otherwise howsoever, either directly or indirectly set up or carry on the business of a —— at —— aforesaid, or at any other place within the said county of ——; and the plaintiff accordingly purchased from the defendant his said house and premises, household furniture and stock-in-trade, for the price and on the terms aforesaid, and paid the defendant the said £—— as such premium for the said goodwill; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said promise of the defendant per-

(*a*) As to what constitutes the goodwill of a trade see *Churton* v. *Douglas*, 28 L. J. C. 841. On the sale of a goodwill there is no implied contract not to carry on a similar trade; but the vendor will be restrained by injunction from carrying on the same business in the name of the old firm. (*Ib.*) Where the vendor contracts not to carry on the same trade within certain limits an injunction will lie to restrain a breach: the limits are to be measured in a straight line. (*Duignan* v. *Walker*, 28 L. J. C. 867.) The purchaser cannot claim liquidated damages agreed upon for the breach of such a contract, and also an injunction to restrain the breach. (*Carnes* v. *Nesbitt*, 30 L. J. Ex. 348; 31 L. J. Ex. 273.)

formed by him; yet the defendant afterwards set up and carried on the business of a ——, at —— aforesaid [*or* at ——, a place within the said county of ——], within the said county of ——.

A like count: Turner v. *Evans*, 2 E. & B. 512.

On an agreement by the defendant, in consideration of being taken into the plaintiff's business as assistant, not to carry on the trade of a druggist, etc., within prescribed limits: Hitchcock v. *Coker*, 6 A. & E. 438; *Carnes* v. *Nesbitt*, 31 L. J. Ex. 273.

Upon a covenant contained in a deed of sale of the business of a carrier, not to exercise the trade between the same places: Archer v. *Marsh*, 6 A. & E. 959.

On a covenant in a deed of sale of the business of a surgeon, etc., imposing similar restrictions: Rawlinson v. *Clarke*, 14 M. & W. 187; *Reynolds* v. *Bridge*, 26 L. J. Q. B. 12; 6 E. & B. 528; *Mercer* v. *Irving*, 27 L. J. Q. B. 291; *Mallan* v. *May*, 11 M. & W. 653.

Upon a covenant in a deed of sale of a partnership business from one partner to another not to exercise the same trade within certain limits: Green v. *Price*, 13 M. & W. 695; S. C. in error, 16 M. & W. 346.

Like count on a covenant in a deed of dissolution of partnership between attorneys: Galworthy v. *Strutt*, 1 Exch. 659.

On bonds conditioned not to exercise certain trades: Ward v. *Byrne*, 5 M. & W. 548; *Mercer* v. *Irving*, 27 L. J. Q. B. 291; *Tallis* v. *Tallis*, 1 E. & B. 391.

On a covenant in a deed of sale of a business, not to carry on the business or to pay liquidated damages: see "Liquidated Damages," ante, p. 188.

USE AND OCCUPATION. *See "Landlord and Tenant," ante*, p. 169.

VENDOR AND PURCHASER. *See "Sale of Land," ante*, p. 214.

WAREHOUSEMAN AND WHARFINGER. *See "Bailments," ante*, p. 71.

WARRANTY.

Upon an express Warranty on a Sale of Goods that the Vendor had Title to sell them (a).

That the defendant, by warranting that he then had lawful right

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(*a*) *Warranty of title.*]—On the sale of a specific chattel there is, in general, no implied warranty of title; but such a warranty may be inferred from the usage or nature of a particular trade. (*Morley* v. *Attenborough*,

and title to sell and dispose of certain goods, sold the said goods to the plaintiff; yet the defendant had not then lawful right and title to sell or dispose of the said goods as aforesaid; whereby the plaintiff was afterwards obliged to deliver up the said goods to *G. H.* who had the lawful right and title thereto, and the plaintiff lost the said goods [and the price which he paid the defendant for the same].

A like count: Morley v. *Attenborough*, 3 Ex. 500.

Count on a warranty that the defendant had title to license the publication of a work: Simms v. *Marryat*, 20 L. J. Q. B. 454.

For the Breach of a Warranty of a Horse. (*C. L. P. Act*, 1852, *Sched. B.* 21 (*b*).)

That the defendant, by warranting a horse to be then [sound and

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3 Ex. 500; *Simms* v. *Marryat*, 20 L. J. Q. B. 458; *Hall* v. *Conder*, 26 L. J. C. P. 138; 2 C. B. N. S. 22.) A concealment by the vendor of defects in his title known to him amounts to fraud and is actionable. (*Ib.*; *Early* v. *Garrett*, 9 B. & C. 932; see *post*, "*Fraud*," Ch. III.) An executory contract of sale of an unascertained chattel may import a warranty of title. (See per Parke, B., in *Morley* v. *Attenborough*, 3 Ex. 510.) Where there is no warranty and the title fails, the purchaser may recover the price paid as upon a failure of consideration. (*Morley* v. *Attenborough*, 3 Ex. 500, 514; and see *Chapman* v. *Speller*, 14 Q. B. 621; *Westropp* v. *Solomon*, 8 C. B. 373; *Alten* v. *Hopkins*, 13 M. & W. 94.) In an action for goods sold and delivered the defendant cannot show under the general issue that the plaintiff had no title to the goods at the time of the sale. (*Walker* v. *Mellor*, 11 Q. B. 478.)

(*b*) *Warranty of quality.*]—Upon a sale of a specific chattel there is no implied warranty of the soundness or quality of the goods. (*Parkinson* v. *Lee*, 2 East, 314; *Dickson* v. *Zizinia*, 10 C. B. 610); nor upon an exchange of chattels. (*La Neuville* v. *Nourse*, 3 Camp. 351.) So on the sale of articles to be used as food for man, there is no implied warranty that they are fit for that purpose. (*Burnby* v. *Bollett*, 16 M. & W. 646; *Emmerton* v. *Matthews*, 31 L. J. Ex. 139.) The concealment of latent defects known to the vendor would be fraud, and ground for an action (see counts, *post*, "*Fraud*," Ch. III.), but even this the vendor might guard himself against by express stipulation. (*Baglehole* v. *Walters*, 3 Camp. 155; *Taylor* v. *Bullen*, 5 Ex. 779.)

A breach of the warranty of a specific chattel sold does not entitle the purchaser to rescind the contract and return the chattel and sue for the price, but only entitles him to an action for damages upon the warranty (*Street* v. *Blay*, 2 B. & Ad. 456; *Gompertz* v. *Denton*, 1 C. & M. 207); and the purchaser may bring his action on the warranty without offering to return the chattel, and without giving notice to the seller of the breach. (*Pateshall* v. *Tranter*, 3 A. & E. 103; *Fielder* v. *Starkin*, 1 H. Bl. 17.)

The contract may, however, be made conditional upon the warranty being true (*Bannerman* v. *White*, 31 L. J. C. P. 28; 10 C. B. N. S. 844), or it may expressly provide for the return of the goods if they should turn out to be not according to the warranty, as in *Adams* v. *Richards*, 2 H. Bl. 573. In such cases the purchaser may, upon a return of the goods, recover back the price in an action for money received. The purchaser would also be entitled to bring such action to recover back the price where the vendor had agreed to rescind the contract and had accepted a return of the goods. The count for money received will also lie where the sale was

quiet to ride], sold the said horse to the plaintiff; yet the said horse was not then [sound and quiet to ride]; [*add special damage when necessary, which may be as follows:*] whereby the said horse became of no use to the plaintiff, and he incurred trouble and expense in causing it to be examined and in keeping it, and in endeavouring to induce the defendant to receive it back; and the plaintiff afterwards resold the said horse for a less sum than he paid the defendant for it, and incurred expense on the resale. [*A qualified warranty must be stated strictly according to its terms. Jones* v. *Cowley*, 4 B. & C. 445.]

A like count: Hopkins v. *Tanqueray*, 15 C. B. 130; *Brady* v. *Todd*, 9 C. B. N. S. 592.

Count on the warranty of a horse on an exchange of horses: Fairmaner v. *Budd*, 7 Bing. 574.

Count for the Breach of a Warranty of a Horse (framed expressly in assumpsit (a).)

That in consideration that the plaintiff would buy of the defen-

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effected by a fraudulent warranty and has been repudiated by the purchaser. (See the cases *supra*, and Chit. Contr. 6th ed. 411.)

As the breach of the warranty of a specific chattel does not entitle the purchaser to return the chattel and rescind the contract, so it forms no defence to an action by the seller for the price. (*Parson* v. *Sexton*, 4 C. B. 899; *Street* v. *Blay*, 2 B. & Ad. 456.) But the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages; and the price agreed upon for the warranted article will be reduced by the difference between the price contracted for in consideration of the warranty and the real value. (*Street* v. *Blay*, 2 B. & Ad. 456; *Allen* v. *Cameron*, 1 C. & M. 840; *Poulton* v. *Lattimore*, 9 B. & C. 259.) He is not however allowed, in further reduction of the price, to give evidence of consequential damages arising from the breach of warranty. He can only recover such damages in an action upon the warranty. (*Mondel* v. *Steel*, 8 M. & W. 858; *Rigge* v. *Burbidge*, 15 M. & W. 598.)

If, in an action for the price, the purchaser reduces the amount of the claim by proving the breach of warranty, he is precluded from afterwards recovering damages for the mere breach of warranty in a cross action. (*Mondel* v. *Steel*, 8 M. & W. 858.)

In an action for a breach of the warranty of a specific chattel sold, as a horse, the measure of damages is the price if the horse be returned; the difference between the price and the real value if it be kept, or if it be resold at a loss. (*Caswell* v. *Coare*, 1 Taunt. 566.) Also the keep of the horse for a reasonable time before return or resale may in general be charged. (*Chesterman* v. *Lamb*, 2 A. & E. 132.) The loss of a bargain of resale at an advanced price cannot be recovered (*Clare* v. *Maynard*, 6 A. & E. 523), though the bargain would be evidence of the value of the goods, supposing them sound. (*Ib.*) The costs of defending an action upon a similar warranty given upon a resale, after notice of the action given to the original seller, may be charged. (*Lewis* v. *Peake*, 7 Taunt. 153.) A liability to pay such costs is sufficient to sustain such charge. (*Randall* v. *Roper*, 27 L. J. Q. B. 266; and see *Dingle* v. *Hare*, 29 L. J. C. P. 143.)

(*a*) This count should be adopted when the plaintiff wishes to declare in assumpsit, as the former count (given by the C. L. P. Act, 1862, amongst counts on contracts, Sched. B. 21), may be treated as framed in tort, and the plea of not guilty may be pleaded to it (per Bramwell, B., in *Millward* v. *Forrest*, at Chambers Hil. Vacation, 1862; and see *Williamson* v.

dant a horse at the price of £——, to be paid by the plaintiff to the defendant for the same, the defendant promised the plaintiff that the said horse was sound; and the plaintiff bought the said horse of the defendant and paid him the said £—— for the same, yet at the time of the making of the said promise by the defendant the said horse was not sound; whereby the said horse became and was of no use or value to the plaintiff, and the plaintiff has lost the expense incurred by him in keeping and feeding the said horse and attempting to cure the same.

On a warranty that pictures sold were painted by Canaletti: Power v. *Barham*, 4 A. & E. 473.

On a warranty that a ship sold was in good repair and copper-fastened: Kain v. *Old*, 2 B. & C. 634; *Pickering* v. *Dowson*, 4 Taunt. 779; *Taylor* v. *Bullen*, 5 Ex. 779.

On a warranty that a carcase of a pig offered for sale was fit for human food: Burnby v. *Bollett*, 16 M. & W. 644; *and see Emmerton* v. *Matthews*, 31 L. J. Ex. 139.

Count on an implied warranty on the sale of a barge that it was reasonably fit for use: Shepherd v. *Pybus*, 3 M. & G. 868.

On a warranty on a sale of seed barley, charging special damage by liabilities incurred to sub-purchasers: Randall v. *Roper*, 27 L. J. Q. B. 266 [*the mere liability is special damage for which the plaintiff may recover without actual payment to the sub-purchaser.* Ib.]; *Carter* v. *Crick*, 28 L. J. Ex. 238; 4 H. & N. 412.

For a Breach of Warranty of the Quality of Goods sold by Description (a).

That by an agreement made by and between the plaintiff and the

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Allison, 2 East. 446, and C. L. P. Act, 1852, s. 74.) If the count is framed as above in assumpsit, the defendant will be obliged to raise distinct issues on the warranty and the unsoundness if he denies both.

(*a*) *Warranty of description.*]—On a sale of unascertained goods, the goods delivered must answer the description under which they are sold in order to satisfy the contract. Hence the description in the contract is substantially warranted. The warranty in such case, if it can be so called, is an essential term of the contract and not a collateral stipulation. *Chanter* v. *Hopkins*, 4 M. & W. 404; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Wieler* v. *Schilizzi*, 25 L. J. C. P. 89; 17 C. B. 619; *Simond* v. *Braddon*, 26 L. J. C. P. 198; 2 C. B. N. S. 324.)

On a sale of unascertained goods by description, if the goods supplied do not correspond with the description, the purchaser may refuse to receive or accept them. (*Street* v. *Blay*, 2 B. & Ad. 456, 463; *Lorymer* v. *Smith*, 1 B. & C. 1; *Dawson* v. *Collis*, 10 C. B. 527; *Wells* v. *Hopkins*, 5 M. & W. 7.) Accordingly, if in such case the purchaser is sued for not accepting the goods, he may plead in defence that the plaintiff was not ready and willing to deliver goods according to the contract. If the purchaser accepts the goods he may maintain an action for the breach of the warranty, or non-compliance with the description, in one of the above forms. And if after having accepted them he is sued for the price, he cannot plead a mere breach of warranty (*Warwick* v. *Nairn*, 10 Ex. 762); but he may, as in the case of a breach of warranty on the sale of a specific article, give in evidence the non-compliance with the description and the consequent difference in value of the goods in order to reduce the amount of

defendant, the defendant bargained and sold to the plaintiff and the plaintiff bought from the defendant certain linseed to arrive by and be delivered from the ship ——, at the price of £—— per ton, and by the said agreement the defendant warranted the said linseed to be Calcutta linseed; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action for the breach of the said warranty hereinafter mentioned; yet the said linseed was not Calcutta linseed, and was in great part composed of substances inferior in value to Calcutta linseed; whereby the plaintiff was unable to sell part of the said linseed, and was obliged to sell the residue thereof for less prices than he otherwise would have done.

A like count: Wieler v. *Schilizzi*, 17 C. B. 621; *and see, ante*, "*Sale of Goods*," p. 213.

A like count on a sale of manure by warranty: Dingle v. *Hare*, 29 L. J. C. P. 143; 7 C. B. N. S. 145.

Like counts on a sale of a cargo of rice: Vernede v. *Weber*, 25 L. J. Ex. 326; 1 H. & N. 311; *Simond* v. *Braddon*, 26 L. J. C. P. 198; 2 C. B. N. S. 324.

On a warranty that a cargo of corn had been shipped in good and merchantable condition: Dickson v. *Zizinia*, 10 C. B. 602.

On a Warranty that Goods sold by Sample were equal to the Sample.

That the defendant, by warranting that —— pockets of hops were then equal in quality and description to a sample thereof then shown to the plaintiff by the defendant, sold the said —— pockets of hops to the plaintiff; yet the said —— pockets of hops were not then equal in quality and description to the said sample thereof; whereby the plaintiff lost the price paid by him to the defendant for the same, and the profits which would otherwise have accrued to him.

A like count: Parkinson v. *Lee*, 2 East, 314.

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damages. (*Mondel* v. *Steel*, 8 M. & W. 858; *Poulton* v. *Lattimore*, 9 B. & C. 259.)

On a sale by sample without warranty, the contract is satisfied by delivery of goods corresponding with the sample, though the parties are mistaken in the quality or description of the goods. (*Carter* v. *Crick*, 28 L. J. Ex. 238; 4 H. & N. 412; and see *Scott* v. *Littledale*, 8 E. & B. 815.)

In an action for delivering goods of an inferior description, the measure of damages is the difference between the value of the goods contracted for at the time appointed for delivery, irrespective of the contract price, and the value of the goods actually delivered. Where the buyer refused to take to the goods as owner on account of the quality, and resold the goods within a reasonable time, the measure of damages was held to be the difference between the value of the goods contracted for at the time of the delivery and the amount made by the resale. (*Loder* v. *Kekulé*, 27 L. J. C. P. 27.) Where the goods were bought for the purpose of selling again, which the seller knew, the damages were assessed upon the value of the goods at a resale, and it seems that in such case the seller would also be responsible for any special loss or damage resulting to the buyer from his reliance upon the warranty in reselling the goods. (*Dingle* v. *Hare*, 29 L. J. C. P. 143; 7 C. B. N. S. 145.)

Count on a warranty that a cargo of wheat sold was equal to a report and samples shown: Russell v. *Nicolopulo*, 8 C. B. N. S. 362.

On a Warranty that Goods manufactured and supplied by Defendant were fit for the purpose for which they were bought.

That the defendant, by warranting that certain copper was then reasonably fit and proper to be used for the purpose of sheathing a ship of the plaintiff, sold the same to the plaintiff to be used for the purpose aforesaid; yet the said copper was not then reasonably fit and proper to be used for the purpose of sheathing the said ship of the plaintiff; whereby the plaintiff, after having sheathed his said ship with the said copper, incurred expense in having the said copper removed, and in having his ship sheathed with other copper.

Like counts: Gray v. *Cox*, 4 B. & C. 108; *Jones* v. *Bright*, 5 Bing. 533.

Count on a contract to manufacture goods for not delivering goods of a merchantable quality: Laing v. *Fidgeon*, 6 Taunt. 108 (*a*).

Count on a contract for the sale of ale for the purposes of use during a sea voyage, for supplying ale unfit for the purpose: Australian St. Nav. Co. v. *Marzetti*, 11 Ex. 228.

On an implied warranty that a rope manufactured to order was fit for the purpose for which it was made: Brown v. *Edgington*, 2 M. & G. 279.

Other counts on warranties framed in tort, see post, c. 3, "*Fraud.*"

Witness (*b*).

Indebitatus Count, by a Witness for his Expenses.

Money payable by the defendant to the plaintiff for work, journeys, and attendances, by the plaintiff done, performed, and bestowed, as a witness in a certain action, for the defendant and at his request, and for money paid by the plaintiff for the defendant at his request.

Like counts: Collins v. *Godefroy*, 1 B. & Ad. 950; *Robins* v. *Bridge*, 3 M. & W. 114; *Hale* v. *Bates*, 28 L. J. Q. B. 14; E. B. & E. 575.

Count for breach of a promise to attend as a witness at a trial without a subpœna: Yeatman v. *Dempsey*, 7 C. B. N. S. 628; 9 C. B. N. S. 881.

Count against a witness for not attending upon a subpœna: see post, c. 3, "*Witness.*"

(*a*) In every contract to manufacture goods it is an implied term that the goods shall be merchantable. (*Laing* v. *Fidgeon*, 6 Taunt. 108.)

(*b*) An action for money received is maintainable to recover back conduct-money paid to a person upon a subpœna to attend a trial as a witness, where he does not attend upon the subpœna. (*Martin* v. *Andrews*, 7 E. & B. 1.)

WORK.

Indebitatus Count for Work, etc.

See *ante*, p. 32; and as to when this count is applicable, ib. n. (*a*).

Indebitatus count for work done by an agent, ante, p. 50, *by an architect* (*Moffatt* v. *Dickson*, 13 C. B. 546); *by an attorney, ante*, p. 66; *by an auctioneer, ante*, p. 68; *by a banker, ante*, p. 73; *by a broker, ante*, p. 99; *by a seaman, ante*, p. 222; *by a servant, ante*, p. 192; *schoolmaster, ante*, p. 222; *by a surgeon and apothecary, ante, p.* 196; *undertaker, ante*, p. 137; *warehouseman, ante*, p. 71; *wharfinger, ante*, p. 72; *by a witness, ante*, p. 234; *for work in mining and carrying iron* (*Sharman* v. *Sanders*, 13 C. B. 166).

On a contract under seal for making a railway: Macintosh v. *Midland Counties Ry. Co.*, 14 M. & W. 548.

For the price of work done under a building contract under seal, with a claim for extra work under the contract: Legge v. *Harlock*, 12 Q. B. 1015.

Count for extra work, provided to be done under the contract according to a written order: Lamprell v. *Billericay Union*, 3 Ex. 283.

A like count, averring a waiver of the writing: Rigby v. *Mayor of Bristol*, 29 L. J. Ex. 359.

Count on a contract under seal to build a ship with a stipulation that no alterations should be made unless ordered in writing, averring a discharge of the stipulation and claiming for alterations: Thames Ironworks and Shipbuilding Co. v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169 (*a*).

For preventing the Plaintiff from completing Work under an Agreement.

That in consideration that the plaintiff agreed with the defendant to do and complete certain work for the defendant, that is to say [*describe the work contracted for and the price according to the agreement*], the defendant promised the plaintiff to permit him to do and complete the said work on the terms aforesaid; and the plaintiff did accordingly commence and in part perform the said work on the terms aforesaid, and has always been ready and willing to do and complete the whole of the said work according to the said agreement, whereof the defendant has always had notice; yet the defendant would not permit the plaintiff to proceed with or complete the said work, and wrongfully discharged and prevented the plaintiff

(*a*) A declaration on a deed averring a discharge or waiver of a stipulation without stating it to be by deed is sufficient, because it is taken to mean a discharge or waiver by deed. (*Thames Haven Co.* v. *Brymer*, 5 Ex. 696; and see *Solvency Mutual Guarantee Co.* v. *Froane*, 7 H. & N. 5.) To a plea that the discharge or waiver was not by deed, the plaintiff cannot reply on equitable grounds that it was by a parol agreement, because such replication would be inconsistent with his declaration. (*Thames Ironworks and Ship-building Co.* v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169.)

from doing and completing the same; whereby the plaintiff has lost the price of the work so done by him as aforesaid, and the profits which would otherwise have accrued to him from the completion of the said work.

Like counts: Pauling v. *Mayor of Dover*, 10 Ex. 753; *Linegar* v. *Pearce*, 9 Ex. 417.

For preventing the plaintiff from completing a contract to build houses: Hitchin v. *Groom*, 5 C. B. 515.

For discharging the plaintiff from completing a contract to fit up a brewery: Pontifex v. *Wilkinson*, 1 C. B. 75; 2 C. B. 349.

For discharging the plaintiff from completing a contract to make and deliver goods: Cort v. *Ambergate Railway Co.*, 20 L. J. Q. B. 460.

On a contract for manufacturing goods and delivering them at a certain place, for not accepting them: Bull v. *Robison*, 10 Ex. 342.

For refusing to permit plaintiff to complete works under a contract with a local board of health: Davies v. *Mayor of Swansea*, 8 Ex. 808.

Against a Workman for using bad Materials and Workmanship.

That in consideration that the plaintiff employed the defendant as a builder to build a house for the plaintiff, at a price to be paid by the plaintiff to the defendant for the same, the defendant promised the plaintiff that he, the defendant, would build the said house of good and proper materials, and in a workmanlike and proper manner; and although the defendant built a house for the plaintiff under colour of the said agreement, and in pretended performance thereof, and the plaintiff paid the defendant the said price for the same, yet the defendant did not build the said house of good and proper materials, or in a workmanlike and proper manner; whereby the same was of no use to the plaintiff, and he has incurred expenses in altering and repairing the same.

A like count: Elsee v. *Gatward*, 5 T. R. 143; *Times Fire Ass. Co.* v. *Hawke*, 28 L. J. Ex. 317.

For negligence in erecting a kitchen-range in the plaintiff's house: Rigge v. *Burbidge*, 15 M. & W. 598.

For not Building and Delivering a Ship by a certain day according to a Contract.

That it was agreed by and between the plaintiff and the defendant, that the defendant should build for the plaintiff a new iron ship, in accordance with a specification then agreed on between them, and should deliver the said ship finished to the plaintiff on or before the —— day of ——, A.D. ——, and that the plaintiff should pay to the defendant for the said ship the sum of £——, by the following payments, that is to say [one-eighth when stem and stern posts up, one-eighth when framed, one-fourth when plated up to gunwale and beams secured, one-fourth when all decks laid and poop plated and riveted, and one-fourth when completely finished and delivered]; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to

have the said agreement performed by the defendant on his part; yet the defendant did not deliver the said ship finished as aforesaid to the plaintiff on or before the said —— day of ——, A.D. ——; whereby the plaintiff was deprived of the profits which he would otherwise have gained from the use of the said ship.

A like count: Fletcher v. *Taylor*, 17 C. B. 21.

Count for a breach of a covenant to do certain work in a specified time and in a workmanlike manner: Northampton Gas Light Co. v. *Parnell*, 15 C. B. 630.

Count against a carpenter for delay in repairing a house, whereby it was damaged: Elsee v. *Gatward*, 5 T. R. 143.

For not making part of a machine by a time agreed upon, whereby the plaintiff was unable to deliver the machine according to a contract: Portman v. *Middleton*, 27 L. J. C. P. 231.

On a bond conditioned for the performance of a contract to execute railway works according to a specification: South Eastern Ry. Co. v. *Warton*, 6 H. & N. 520.

On a contract of guarantee for the due performance of building work: Watts v. *Shuttleworth*, 29 L. J. Ex. 229.

On a guarantee for the performance of a contract for building a ship: General Steam Navigation Co. v. *Rolt*, 6 C. B. N. S. 550.

CHAPTER III.

COUNTS IN ACTIONS FOR WRONGS (*a*).

ADMINISTRATORS. *See post, "Executors."*

AGENTS (*b*).

Against a Broker for Selling Goods on Credit, contrary to Orders.

That the plaintiff employed the defendant, as his broker, for reward to the defendant, to sell certain goods for the plaintiff for ready money and not otherwise; and the defendant received and

(*a*) *Counts in actions for wrongs.*]—The C. L. P. Act, 1852, appears to have contemplated the division of all causes of action into those on contracts, and those for wrongs independent of contract; and the statements of causes of action given in the schedule (B) strictly follow that division.

Before the C. L. P. Act, 1852, causes of action were classed under the two divisions of actions of contract and actions of tort; the former comprising the actions of Assumpsit, Debt, and Covenant; and the latter the actions of Case, Trover, Detinue (except in some points of view, see *post*, "*Detinue*," p. 271), Replevin, and Trespass. (1 Chit. Pl. 7th ed. 109.) But, for certain technical reasons, and particularly in order to avoid the rule which prohibited the joinder of counts in the form of contract with counts in the form of tort, the declaration was framed in tort in many cases in which the cause of action was the breach of a duty essentially founded on contract, as in actions against carriers and other bailees. (*Ante*, pp. 49, 101.) This practice is still continued, although the rules respecting the misjoinder of counts have been abolished, as the form of action involves other important consequences in regard to the form of the plea, the joinder of parties, and also as to costs and other matters.

Such causes of action, however, could not strictly be called wrongs independent of contract; and none such are found amongst the examples of that class in the schedule to the C. L. P. Act, 1852, though their existence in practice appears to be recognized in the 74th section of that Act, which recites that certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and provides for the doubts which might arise as to the form of pleas in such actions. It has therefore been thought most convenient, in accordance with the common practice, to treat actions of this nature as actions for wrongs, and to class them, in respect of their form, with actions for wrongs strictly so called, as distinguished from actions founded on contracts. (See *post*, "*Agents*," "*Bailments*," "*Carriers*," etc.) At the same time the term *independent of contract* has been omitted from the title, as not being strictly appropriate to the whole class.

(*b*) Actions against agents for neglect or misconduct may in general be brought either in the form of a breach of contract or as for a wrong.

had the said goods as such broker for the purpose and on the terms aforesaid; yet the defendant afterwards sold the said goods on credit and otherwise than for ready money; whereby the plaintiff has been deprived of the price and value of the said goods, and s likely to lose the same.

A like count: Boorman v. *Brown*, 3 Q. B. 511.

Against a commission agent for selling goods at a less price than ordered: Raleigh v. *Atkinson*, 6 M. & W. 670.

Against an accountant for negligence in making out accounts: Story v. *Richardson*, 6 Bing. N. C. 123.

Against an agent for drawing bills on the plaintiff for purposes not warranted by his authority: Pickwood v. *Neate*, 10 M. & W. 206.

Against an insurance broker for not effecting an insurance on a ship pursuant to his retainer: Turpin v. *Bilton*, 5 M. & G. 455; *Cahill* v. *Dawson*, 26 L. J. C. P. 253; 3 C. B. N. S. 106.

Against a surveyor and valuer for loss arising from ignorance and want of skill in his profession: Jenkins v. *Betham*, 15 C. B. 168.

Against an agent for falsely representing that he had authority to make a contract: Randell v. *Trimen*, 25 L. J. C. P. 307; 18 C. B. 786; *and see ante*, p. 53.

For other counts against agents, see ante, "*Agents*," p. 50.

ASSAULT. *See post*, "*Trespass to the Person.*"

ASSIGNEES.

Counts by assignees of bankrupts and insolvents for conversion of goods: see post, "*Conversion*," p. 253.

(*See ante*, "*Carriers*," p. 101, n.; *Samuel* v. *Judin*, 6 East, 333; *Boorman* v. *Brown*, 3 Q. B. 511; 11 Cl. & F. 1; *Corbett* v. *Packington*, 6 B. & C. 268; *Courtenay* v. *Earle*, 10 C. B. 73.) Since the C. L. P. Act, 1852, the form of action is not mentioned in the writ, and counts in tort and assumpsit may be joined; consequently the form of the action ceases to be a matter of importance so far as the form of the count is concerned. It seems more strictly correct to frame the action against an agent in contract. In a manner similar to the above the forms which have been already given for actions on breaches of contract by agents may be readily altered into the form of actions for wrongs. It is never necessary to aver, as was formerly the general practice, the duty or legal liability charged; for that duty is a mere inference of law from the facts stated. Such averment is superfluous if the facts stated show a legal liability, and it is insufficient if they do not. (*Brown* v. *Mallet*, 5 C. B. 599; *Seymour* v. *Maddox*, 16 Q. B. 326; *Roberts* v. *Great Western Ry. Co.*, 4 C. B. N. S. 506.)

An action will not lie against an agent for merely omitting to perform a commission, unless he is bound by some contract or duty to undertake it; but if he performs it, though gratuitously, he is liable to an action for misfeasance in the performance (*ante*, p. 51, n. (*a*)). Hence in actions against agents framed in tort for non-feasance, a valid contract must be shown to perform the Act omitted.

Attorney (*a*).

Against an Attorney for Negligence in Defending an Action.

That the plaintiff retained the defendant, as and being an attorney of the Court of ——, to conduct the defence of the plaintiff in an action depending in that court at the suit of *G. H.* against the now plaintiff, for reward to the defendant, and the defendant, as and being such attorney, accepted the said retainer; yet the defendant conducted the said defence negligently and unskilfully as such attorney; whereby judgment by default was signed against the now plaintiff in the said action, and the said *G. H.* recovered against the plaintiff a sum of money for the alleged [debt] damages and costs of the said *G. H.* therein, and the plaintiff thereby also incurred other costs and expenses.

A like count: Godefroy v. *Jay*, 7. Bing. 413.

Against an attorney for compromising an action contrary to the directions of the client: Fray v. *Vowles*, 28 L. J. Q. B. 232.

Against an attorney, retained to effect a mortgage, for disclosing a defect in his client's title to the estate: Taylor v. *Blacklow*, 3 Bing. N. C. 235.

For other counts, against attorneys, see ante, "*Attorney,*" p. 66.

Bailments.

Against a Bailee for Negligence in keeping Goods.

That the plaintiff delivered to the defendant certain goods to be safely kept and taken care of by the defendant for the plaintiff, for reward to the defendant, and the defendant received and had the said goods in his care and keeping for the purpose and on the terms aforesaid; yet the defendant kept the said goods in a negligent manner, and took no care of the same; whereby they were lost to the plaintiff.

A like count: Corbett v. *Packington*, 6 B. & C. 268; *Mostyn* v. *Coles*, 31 L. J. Ex. 151.

Count for losing a dog entrusted to the defendant: Mackenzie v. *Cox*, 9 C. & P. 632.

Count for carelessness in riding the plaintiff's horse, delivered to the defendant to be ridden by him gratuitously at the plaintiff's request for the purpose of showing it to a purchaser: Wilson v. *Brett*, 11 M. & W. 113.

Count for pawning paper delivered to the defendant for the purpose of printing: Smith v. *White*, 8 Dowl. 255.

Count for not redelivering to the plaintiff halves of bank notes de-

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(*a*) Actions against attorneys may, in general, be framed either in the form of contract or of tort. Counts in tort may readily be framed from those in contract given *ante*, p. 66. As to the privilege of an attorney to be sued in his own court, see *ante*, 6 n. (*b*).

livered to the defendant in intended payment of a debt which the plaintiff declined to complete: Smith v. *Mundy*, 29 L. J. Q. B. 172.

Count by a driver of a hackney carriage against his employer for defacing his license, deposited with the employer according to the statute: Hurrell v. *Ellis*, 2 C. B. 295; *Rogers* v. *Macnamara*, 14 C. B. 27.

Count for not delivering up a ship's register on request to the party entitled, stating special damage: Wiley v. *Crawford*, 29 L. J. Q. B. 244. (*See Merchant Shipping Act*, 1854, 17 & 18 *Vict. c.* 104, *s.* 50.)

Count by a gratuitous borrower against the lender of a machine for damage caused by its dangerous state (*a*): *Blakemore* v. *Bristol & Exeter Ry. Co.*, 27 L. J. Q. B. 167; 8 E. & B. 1035; *and see post*, "*Negligence.*"

For other counts on bailments, see "*Bailments,*" *ante*, p. 71.

BANKER. *See ante*, p. 73.

BANKRUPTCY (*b*).

(*a*) Upon the gratuitous bailment of a chattel, lent for use, the respective duties of the borrower and the lender have been laid down as follows:—"The borrower is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all for anything which may be qualified as legal fraud. So, the lender must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." (*Blakemore* v. *Bristol and Exeter Ry. Co.*, 8 E. & B. 1035.) In accordance with the above law, it was held that a gratuitous lender of a scaffold was not liable for an injury sustained by the borrower, which was caused by the defective construction of the scaffold, of which the lender was not aware; although the jury found that he had been guilty of negligence in the construction, and that the injury was caused by that negligence. (*M'Carthy* v. *Young*, 30 L. J. Ex. 227; 6 H. & N. 329.)

(*b*) By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 159, it is enacted that "Every action brought against any person for anything done in pursuance of this Act, shall be commenced within three months next after the fact committed; and the defendant in any such action may plead the general issue, and give this Act and the special matter in evidence at the trial, and that the same was done by the authority of this Act; and if it shall appear so to have been done, or that such action was commenced after the time limited as aforesaid for bringing the same, the jury shall find for the defendant; and if there be a verdict for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action or suit after appearance thereto, or if upon demurrer judgment shall be given against the

CARRIERS; I. BY LAND (*a*).

Against a Common Carrier for refusing to carry Goods.

That the defendant was a common carrier of goods for hire from —— to ——, and the plaintiff at a reasonable and proper time in that behalf tendered to him at —— aforesaid, at his place of business for the receipt of goods to be carried by him as such carrier, certain goods of the plaintiff, and requested the defendant as such carrier to receive the same and carry them from —— to —— aforesaid, and at the last-mentioned place to deliver the same for the plaintiff, for hire to the defendant; and the plaintiff was then ready and willing and offered to pay to the defendant his reasonable hire in that behalf, whereof the defendant then had notice, and the defendant then had sufficient time, means, and convenience to receive and carry and deliver the said goods as aforesaid, and could and ought to have done so; yet the defendant did not nor would receive and carry the said goods for the plaintiff.

Like counts: Pickford v. *Grand Junction Ry. Co.*, 8 M. & W. 372; *Johnson* v. *Midland Ry. Co.*, 4 Ex. 367; *Crouch* v. *London and North-Western Ry. Co.*, 14 C. B. 256; *Crouch* v. *Great Northern Ry. Co.*, 9 Ex. 556.

Count against a railway company for refusing to carry goods except upon unreasonable conditions: Garton v. *Bristol & Exeter Ry. Co.*, 30 L. J. Q. B. 273; E. B. & S. 112.

For refusing to carry a passenger's luggage: Munster v. *South-Eastern Ry. Co.*, 27 L. J. C. P. 308; 4 C. B. N. S. 676.

For refusing to carry goods at a lawful rate of charge: Baxendale v. *Eastern Counties Ry. Co.*, 27 L. J. C. P. 137; 4 C. B. N. S. 63.

Counts against a railway company for refusing to carry packed parcels, whereby the plaintiff was injured in his trade as a carrier: Crouch v. *Great Northern Ry. Co.*, 25 L. J. Ex. 137; 11 Ex. 742; *and see ante*, p. 106 *n.* (*b*).

Against Carriers for not carrying and delivering Goods within a reasonable time.

That the plaintiff delivered to the defendants, as and being carriers of goods [by railway] from —— to ——, certain goods of the plaintiff, to be by them carried from —— to —— aforesaid and there delivered for the plaintiff within a reasonable time in that behalf, for reward to the defendants, and the defendants as such carriers received the said goods for the purpose and on the terms aforesaid, and a reasonable time for carrying and delivering the same as aforesaid elapsed; yet the defendants neglected for a long and unreasonable time in that behalf to carry and deliver the said

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plaintiff, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any such action as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

(*a*) As to the duties and liabilities of carriers of goods by land, see *ante*, p. 103.

goods as aforesaid, whereby the plaintiff was deprived of the use of the said goods for a long time, and the same were diminished in value.

Like counts: Raphael v. *Pickford*, 5 M. & G. 551; *Wise* v. *Great Western Ry. Co.*, 25 L. J. Ex. 258; 1 H. & N. 63.

Against Carriers for not carrying and delivering Goods in time for a Market.

That the plaintiff delivered to the defendants, as and being carriers of goods [by railway] from —— to ——, certain goods of the plaintiff to be by them carried from —— to —— aforesaid and there delivered for the plaintiff in time for a market to be there held on the —— day of ——, A.D. ——, for reward to the defendants, and the defendants as such carriers received the said goods for the purpose and on the terms aforesaid; and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods carried by the defendants from —— to —— aforesaid, and there delivered to him by the defendants at the time aforesaid; yet the defendants did not deliver the said goods for the plaintiff at —— aforesaid in time for the said market there held as aforesaid, whereby the plaintiff was deprived of the use of the said goods, and lost the profits which he would have made by selling them at the said market, and the benefit of the expense which he incurred in travelling to —— aforesaid to meet the said goods, and in preparing to receive the same and sell them at the said market, and the said goods were deteriorated and diminished in value.

Counts for delay in carrying, charging the loss of market as special damage: Walker v. *York & North-Midland Ry. Co.*, 23 L. J. Q. B. 73; *White* v. *Great Western Ry. Co.*, 2 C. B. N. S. 7; *Hughes* v. *Great Western Ry. Co.*, 14 C. B. 637.

Against Carriers for damaging Goods.

That the defendants were carriers of goods [by railway] for hire from —— to ——, and the plaintiff delivered to the defendants and the defendants received as such carriers certain goods of the plaintiff to be by the defendants safely carried from —— to —— aforesaid and there delivered for the plaintiff, for reward to the defendants; and all conditions were performed, and all things happened, necessary to entitle the plaintiff to have the said goods safely carried as aforesaid; yet the defendants did not safely carry the said goods as aforesaid, and so negligently carried the same that they were broken, damaged, and spoiled.

Like counts: Behrens v. *Great Northern Ry. Co.*, 30 L. J. Ex. 153; *Collard* v. *South-Eastern Ry. Co.*, 30 L. J. Ex. 393; *Coxon* v. *Great Western Ry. Co.*, 29 L. J. Ex. 165; 5 H. & N. 274.

A like count, alleging a declaration of the value of the goods under the Carriers Act (11 Geo. IV. & 1 Will. IV. c. 68), and the acceptance of an engagement to pay an increased rate of charge: Behrens v. *Great Northern Ry. Co.*, 30 L. J. Ex. 153; 6 H. & N. 366. *(See the Carriers Act, post, c. 5, "Carriers.")*

Against a Carrier for losing Goods (a).

That the defendant was a carrier of goods for hire from —— to ——, and the plaintiff delivered to the defendant, and the defendant received as such carrier certain goods of the plaintiff, to be by the defendant taken care of, and safely and securely carried from —— to —— aforesaid, and there delivered for the plaintiff, within a reasonable time in that behalf, for reward to the defendant; and a reasonable time for carrying and delivering the same as aforesaid elapsed; yet the defendant did not take care of the said goods, and safely and securely carry and deliver the same to the plaintiff as aforesaid, whereby the same were lost to the plaintiff.

Like counts: Sanquer v. *London and South-Western Ry. Co.*, 16 C. B. 163; *Coombs* v. *Bristol and Exeter Ry. Co.*, 27 L. J. Ex. 269; 3 H. & N. 1; *Metcalfe* v. *London and Brighton Ry. Co.*, 27 L. J. C. P. 205; 4 C. B. N. S. 307; *Simons* v. *Great Western Ry. Co.*, 2 C. B. N. S. 620; *Harrison* v. *London and Brighton Ry. Co.*, 29 L. J. Q. B. 209.

Count against a railway company for negligently injuring cattle carried under a special contract: Carr v. *Lancashire and Yorkshire Ry. Co.*, 21 L. J. Ex. 261. [*As to the liability of carriers in respect of carriage of live animals, see ib., and* 17 & 18 Vict. c. 31; *M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 27 L. J. Ex. 201; 2 H. & N. 693; *reversed on error*, 4 H. & N. 327; *Harrison* v. *London and Brighton Ry. Co.*, 29 L. J. Q. B. 209; *reversed on error*, 31 L. J. Ex. 113.]

By a consignor against a carrier, for not taking reasonable care of goods after a refusal by the consignee to accept them: Hudson v. *Baxendale*, 27 L. J. Ex. 93; 2 H. & N. 575 (*b*).

Against a Booking-Office Keeper for losing Goods.

That the defendant kept an office for receiving and booking goods, and delivering the same to certain carriers for the purpose of being carried to the places to which the same might respectively be directed, and for keeping and taking care of such goods at the said office until such delivery as aforesaid, for reward to the defendant;

(*a*) A carrier is not liable in an action of trover for a mere omission or negligence in his employment, as for a nondelivery or loss of or injury to the goods, but must be sued in a special action for the breach of the contract or duty. (2 Wms. Saund. 47 *i.*; *Ross* v. *Johnson*, 5 Burr. 2825; *Williams* v. *Gesse*, 3 Bing. N. C. 849.) But a misdelivery of the goods to a wrong person amounts to a conversion, for which he may be sued in trover. (Ib. *Devereux* v. *Barclay*, 2 B. & Ald. 704; *Stephenson* v. *Hart*, 4 Bing. 483; *Wyld* v. *Pickford*, 8 M. & W. 443.)

(*b*) A common carrier is not responsible as an insurer after carriage of the goods to their destination, though they are not accepted by the consignee; after completion of the carriage the carrier remains liable only for negligence. (*Garside* v. *Trent Navigation*, 4 T. R. 581; and see *Bourne* v. *Gatliffe*, 3 M. & G. 643; *Crouch* v. *Great Western Ry. Co.*, 27 L. J. Ex. 345.)

and thereupon the plaintiff delivered to the defendant at the said office a parcel of the plaintiff, to be by the defendant booked and delivered within a reasonable time in that behalf to a certain carrier for the purpose of being carried by him to the place to which the same was directed, and to be kept and taken care of at the said office by the defendant until such delivery, for the plaintiff, for reward to the defendant, and the defendant received and had the said parcel for the purpose and on the terms aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods taken care of and delivered as aforesaid; yet the defendant did not deliver the said parcel to the said carrier for the purpose aforesaid within such reasonable time as aforesaid, and the defendant did not in the meantime and until such delivery take reasonable care thereof at the said office, and whilst he had the care and custody of the said parcel for the purpose aforesaid negligently lost the same.

A like count: Gilbart v. *Dale*, 5 A. & E. 543.

Against a railway company for losing goods left in their custody at a station, see ante, p. 108.

Carriers; II. by Water.

Against Shipowners for the Loss of Goods.

That the plaintiff caused to be delivered to the defendants, and they received, certain goods to be by them shipped on board of the ship ——, and safely and securely carried therein from —— to ——, and there delivered for the plaintiff, certain perils and casualties only excepted, for freight payable by the plaintiff to the defendants; and the defendants were not prevented from so shipping, carrying, or delivering the said goods by any of the perils or casualties aforesaid, and all conditions were performed, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said goods safely and securely carried and delivered by the defendants as aforesaid; yet the defendants did not safely and securely carry and deliver the said goods as aforesaid, and the same were during the said voyage lost to the plaintiff.

Like counts: Gibbs v. *Potter*, 10 M. & W. 70; *Morewood* v. *Pollok*, 1 E. & B. 743; *Williams* v. *African Steamship Co.*, 26 L. J. Ex. 69.; 8 H. & N. 300.

By the consignee against the carrier for refusing to deliver the goods: Jones v. *Jones*, 8 M. & W. 431.

For Damage to Goods shipped in the Defendant's Ship to be carried.

That the plaintiff delivered to the defendant, and the defendant received from the plaintiff, certain goods of the plaintiff, to be by the defendant safely and securely shipped and carried in the ship —— on a voyage from —— to ——, and there delivered for the plaintiff, for freight payable by the plaintiff to the defendant; yet

the defendant so negligently carried the said goods in the said ship on the said voyage, that by reason thereof a large part of them was damaged and rendered of no use to the plaintiff.

Like counts: Laveroni v. *Drury*, 8 Ex. 166; *Alston* v. *Herring*, 25 L. J. Ex. 177; 11 Ex. 822.

Count against a ferryman for damaging goods in the passage: Walker v. *Jackson*, 10 M. & W. 161.

For Damage to Goods occasioned by negligent Stowage.

That the plaintiff delivered to the defendant, and the defendant received from the plaintiff, certain goods of the plaintiff, to be by the defendant shipped and stowed on board the ship ——, and carried therein from —— to ——, for the plaintiff, certain perils and casualties only excepted, for freight payable by the plaintiff to the defendant, and upon the terms that the defendant should use due and proper care in the stowage of the said goods; yet the defendant did not use due and proper care in the stowage of the said goods, and so negligently stowed the same that by reason thereof, and not by reason of any of the said excepted perils or casualties, the said goods were damaged.

Like counts: Phillips v. *Clark*, 2 C. B. N. S. 156; 26 L. J. C. P. 168; *Hutchinson* v. *Guion*, 28 L. J. C. P. 63; 5 C. B. N. S. 149; *Blaikie* v. *Stembridge*, 28 L. J. C. P. 333; 6 C. B. N. S. 894 [*where it was held that the master was not liable for the negligence of the stevedore appointed by the charterer*].

By a carrier against the shipper of goods for knowingly shipping dangerous goods without giving notice to the carrier: Williams v. *East India Co.*, 3 East, 192; *Brass* v. *Maitland*, 26 L. J. Q. B. 49; 6 E. & B. 471. *And see Alston* v. *Herring*, 25 L. J. Ex. 177; 11 Ex. 822; *Hutchinson* v. *Guion, supra; Farrant* v. *Barnes*, 31 L. J. C. P. 137.

Carriers; III. of Passengers (*a*).

Against a Railway Company for refusing to carry the Plaintiff.

That the defendants were common carriers of passengers and their luggage on a railway from —— to ——, for reward to the defendants; and the plaintiff at a reasonable and proper time and place in that behalf tendered himself with his reasonable luggage to the defendants at —— aforesaid, to be received and carried by them as a passenger with his said luggage from the last-mentioned place to —— aforesaid, and requested the defendants as such carriers to receive and carry him with his said luggage as such passenger as afore-

(*a*) As to the duties and liabilities of carriers of passengers, see *ante*, p. 113.

said; and the plaintiff was then in a fit and proper state to be carried by the defendants as such passenger as aforesaid with his said luggage, and was then ready and willing and offered to pay to the defendants all reasonable hire and reward for being so carried as such passenger as aforesaid with his said luggage, whereof the defendants then had notice; and the defendants then had sufficient time, room, and convenience to receive and carry the plaintiff as such passenger as aforesaid with his said luggage, and could and ought to have done so; yet the defendants did not nor would receive and carry the plaintiff with his said luggage as such passenger as aforesaid.

Like count against carriers by ship, for not receiving a passenger: Benett v. *Peninsular and O. Steam-Boat Co.*, 6 C. B. 775.

Against a railway company for refusing to carry a passenger's luggage: Munster v. *South-Eastern Ry. Co.*, 4 C. B. N. S. 676.

Count against a railway company for not admitting the plaintiff's conveyance within the station. (This count will not lie at the suit of the owner of a public conveyance, though taking passengers.) Barker v. *Midland Ry. Co.*, 25 L. J. C. P. 184; 18 C. B. 46.

Against a Railway Company for the Loss of a Passenger's Luggage.

That the defendants were carriers of passengers and their luggage upon a railway from —— to ——, for reward to the defendants; and the plaintiff became and was received by the defendants as a passenger with his luggage, that is to say [a carpet-bag, *or as the case may be*], to be by them as such carriers safely and securely carried on the said railway from —— to —— aforesaid by a certain train, and the said luggage to be delivered by the defendants to the plaintiff at —— aforesaid on his arrival there by the said train, for reward to the defendants, and a reasonable time for carrying and delivering the said luggage as aforesaid elapsed; yet the defendants did not safely and securely carry the said luggage and deliver the same to the plaintiff as aforesaid; whereby the said luggage was lost to the plaintiff.

Like counts: Marshall v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655; *Williams* v. *Great Western Ry. Co.*, 10 Ex. 15; *Butcher* v. *London and South-Western Ry. Co.*, 16 C. B. 13; *Munster* v. *South-Eastern Ry. Co.*, 27 L. J. C. P. 308; *Great Northern Ry. Co.* v. *Shepherd*, 8 Ex. 30; *Mytton* v. *Midland Ry. Co.*, 28 L. J. Ex. 385; 4 H. & N. 615; *and see counts framed in contract,* "*Carriers,*" *ante, p.* 114.

A like count against a carrier by ship: Wilton v. *Royal Atlantic Mail Steam Nav. Co.*, 30 L. J. C. P. 369.

A like count against a company carrying between two places, partly by railway and partly by steamboat: Pianciani v. *London and South-Western Ry. Co.*, 18 C. B. 226.

A like count against a coach proprietor: Miles v. *Cattle*, 6 Bing. 743.

A like count for a temporary loss of luggage: Hearn v. *London and South-Western Ry. Co.*, 10 Ex. 793. [*The Carriers Act is no defence to the latter count.* Ib.; *post, Pleas,* "*Carriers,*" *chap.* 5.]

Against a Railway Company for Delay in a Train.

That the defendants were carriers of passengers in a railway from —— to —— for hire, and the plaintiff became and was received by the defendants as such carriers as a passenger to be carried by them on the said railway from —— to —— aforesaid, for reward to the defendants, by a train which the defendants advertised and represented to the plaintiff by a published train-bill to be a train starting from —— aforesaid to —— aforesaid at —— o'clock in the [afternoon], and as arriving at —— aforesaid at —— o'clock in the [afternoon]; and by reason of the defendants' negligence, default, and want of proper management of their traffic upon the said railway, the said train did not start from —— aforesaid at the time in that behalf above specified, or within a reasonable time afterwards, and did not arrive at —— aforesaid at the time in that behalf aforesaid or within a reasonable time afterwards; whereby the plaintiff was put to expense and inconvenience, and was prevented from attending to his business at —— aforesaid as he otherwise would have done.

Like counts framed in contract, ante, p. 115.

Against a Carrier for a personal Injury to a Passenger.

That the defendants were carriers of passengers upon a railway from —— to ——, for reward to the defendants, and the plaintiff became and was received by the defendants as a passenger to be by them safely and securely carried upon the said railway on a journey from —— to —— aforesaid, for reward to the defendants; yet the defendants did not safely and securely carry the plaintiff upon the said railway on the said journey, and so negligently and unskilfully conducted themselves in carrying the plaintiff upon the said railway on the journey aforesaid, and in managing the said railway and the carriage and train in which the plaintiff was a passenger upon the said railway on the said journey as aforesaid, that the plaintiff was thereby wounded and injured, and incurred loss of time and expense in and about the cure of his wounds and injuries.

Like counts: Carpue v. *London and Brighton Ry. Co.*, 5 Q. B. 747; *Withers* v. *North Kent Ry. Co.*, 27 L. J. Ex. 417.

Against a coach proprietor for injury to a passenger: Curtis v. *Drinkwater*, 2 B. & Ad. 169; *Ansell* v. *Waterhouse*, 6 M. & S. 385.

A like count against an omnibus proprietor: Brien v. *Bennett*, 8 C. & P. 724.

Against a railway company for an injury to a passenger occasioned by their neglect to light the station: Martin v. *Great Northern Ry. Co.*, 16 C. B. 179; *and see post,* "*Negligence.*"

Against the owner of a steamer for an injury to a passenger; Dalyell v. *Tyrer*, 28 L. J. Q. B. 52.

Count by the executor or administrator of a passenger killed, under Lord Campbell's Act, post, "*Executors,*" *p.* 284.

Carriers; IV. of Messages.

Against an Electric Telegraph Company for not transmitting a Message.

That the defendants carried on the business of transmitting messages for the public at large by electric telegraph (amongst other places) from —— to ——, for reward to the defendants; and the plaintiff delivered to the defendants and they received from the plaintiff a message to be transmitted by them for the plaintiff from —— to —— aforesaid, for reward to the defendants, and a reasonable time for so transmitting the said message elapsed; yet the defendants did not transmit the said message from —— to —— aforesaid; whereby the plaintiff was prevented from receiving a sum of money which would have been sent to him if the said message had been so transmitted as aforesaid, and was put to delay and inconvenience in waiting for an answer to the said message, and was prevented from transacting his business, and lost the money which he paid to the defendants for transmitting the said message.

A like count framed in assumpsit for transmitting a message incorrectly; MacAndrew v. *Electric Telegraph Co.*, 17 C. B. 3.

Common (*a*).

For a Disturbance of the Plaintiff's Right of Common of Pasture, by digging up the Turf and Soil and enclosing.

(*Venue local.*) That the plaintiff was possessed of a messuage and land, and by reason thereof was entitled to have common of pasture for all his commonable cattle levant and couchant in and upon his said messuage and land, over a waste or common called ——, situate

(*a*) *Common.*]—By the Prescription Act, 2 & 3 Will. IV. c. 71, s. 1, the actual enjoyment of right of common by any person claiming right thereto without interruption for the full period of thirty years next before action gives a *primâ facie* title, which cannot be defeated by showing only that such right was first enjoyed at any time prior to such period, but it may be defeated in any other way by which it was liable to be defeated before the Act; and after such an enjoyment for the period of sixty years next before action, the right is to be deemed absolute and indefeasible, unless it appears that the same was enjoyed by consent or agreement by deed or writing. As to the meaning of "Interruption" in the Act, see *Carr* v. *Foster*, 3 Q. B. 581.

In declaring for an injury to a right of common, or any other prescriptive right, it has always been sufficient for the plaintiff to state his title generally in the form given in the following precedents. (1 Wms. Saund. 345 (2).) This mode of pleading has been expressly preserved and sanctioned by the Prescription Act, the 5th section of which enacts that in all pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all the matters in the Act mentioned and provided which shall be applicable to the case shall be admissible in evidence to sustain or rebut such allegation. In pleas and subsequent pleadings such general statement of the right was inadmissible; and the title must have been

at ——, at all times of the year, as to the said messuage and land appertaining; and the defendant on divers days and times disturbed the plaintiff in the use and enjoyment of his said common of pasture by wrongfully [digging up and subverting the soil, and carrying away the turf of the said waste, and by enclosing and separating part of the said waste from the residue thereof, and so continuing the same for a long time]; whereby the plaintiff was prevented from having the use and enjoyment of his said common of pasture in so ample and beneficial a manner as he otherwise might have had.

Like counts: Carr v. *Foster*, 3 Q. B. 581; *Ricketts* v. *Salwey*, 2 B. & Ald. 360.

For Obstructing the Plaintiff's Right of Common by putting on Cattle.

(*Venue local.*) That the plaintiff was possessed of certain land, and by reason thereof was entitled to have common of pasture for his sheep and all other his commonable cattle levant and couchant in and upon his said land, in a waste or common called ——, situate at ——, at all times of the year, as to his said land appertaining; and the defendant on divers days and times disturbed the plaintiff

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more specially set forth; the statute however has simplified the mode of doing so. (1 Wms. Saund. 345 (2). *Post, Pleas*, "*Common.*")

A right of common of pasture for cattle levant and couchant cannot be prescribed for in respect of a messuage only without land. (*Scholes* v. *Hargreaves*, 5 T. R. 46; *Benson* v. *Chester*, 8 T. R. 396.)

Though the right may be stated generally in the declaration in respect to the title, it should be described accurately in respect to its extent, with all the restrictions and qualifications, if any, to which it is subject. It is immaterial that a right is alleged more narrowly than it really exists, provided the allegation is wide enough to cover the disturbance complained of (see *Duncan* v. *Louch*, 6 Q. B. 904; *Tebbutt* v. *Selby*, 6 A. & E. 786); but if the right is alleged too largely and the plaintiff fails in the proof of part, he cannot, without an amendment, have a verdict on a traverse of the right, although he prove sufficient to maintain the action. (*Beadsworth* v. *Torkington*, 1 Q. B. 782; and see *Brunton* v. *Hall*, 1 Q. B. 792; *Drewell* v. *Towler*, 3 B. & Ad. 735.)

A right of common was held to be well laid as "for sheep at all times of the year," though it was proved to be subject to folding the sheep at night on a certain farm; the expression being held to mean all usual times. (*Brook* v. *Willet*, 2 H. Bl. 224.) Where the declaration alleged a right of common for all commonable cattle, it was held to be some evidence of that allegation that the plaintiff was shown to have turned on all the cattle which he kept, although he had never kept any sheep. (*Manifold* v. *Pennington*, 4 B. & C. 161.) Where the declaration claimed a right of common in the inhabitants of a borough, and it appeared that the limits of the borough had been extended, and that the right was confined to the ancient limits, the variance was held fatal although the plaintiff proved that he inhabited within the ancient limits. (*Beadsworth* v. *Torkington*, 1 Q. B. 782.) Where the declaration alleged a right of common by reason of the possession of a messuage and land, and the proof was of a right of common in respect of land only without any messuage, the plaintiff was held entitled to the verdict. (*Ricketts* v. *Salwey*, 2 B. & Ald. 360.)

If the allegation of the right is divisible, it seems that the plaintiff is entitled to a limited verdict for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles* v. *Groves*, 12 Q. B. 721; 1 Chit. Pl. 7th ed. 400.)

in the use and enjoyment of his said common of pasture, by wrongfully putting divers horses, cows, and sheep in and upon the said waste, and keeping and depasturing the same there for a long time; whereby the plaintiff was prevented from having the use and enjoyment of his said common of pasture in so ample and beneficial a manner as he otherwise might have had.

A like count: *Bowen* v. *Jenkin*, 6 A. & E. 911.

A like count in respect of common of pasture to which the plaintiff was entitled as a freeman of a borough: *Beadsworth* v. *Torkington*, 1 Q. B. 782.

A like count by an owner of land in a common field claiming a right of common over the whole field: *Cheesman* v. *Hardham*, 1 B. & Ald. 706.

A like count claiming a right of common for a certain number of cattle of different kinds: *Nichols* v. *Chapman*, 29 L. J. Ex. 461.

For disturbing a right of common by surcharging: *Bowen* v. *Jenkin*, 6 A. & E. 911.

For disturbing a right of common by removing the manure of the cattle and so impoverishing the common: *Pindar* v. *Wadsworth*, 2 East, 154.

Company.

Count against a Joint Stock Company for refusing to Register the Plaintiff as a Shareholder (a).

(*See the form of commencement, ante, p.* 21.) That the defendants

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(*a*) By the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 25, it is enacted, "that if the name of any person is without sufficient cause entered or omitted to be entered in the register of shareholders of any company, such person, or any shareholder of the company, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's superior courts of law or equity, and as respects companies registered in Scotland by summary petition to the court of session, apply to such court for an order that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and if the company makes default or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay for the amount of damage he may thereby have sustained."

By the Joint Stock Companies Act, 1857, 20 & 21 Vict. c. 14, s. 9, "the court may, in any proceeding under the 25th section of the principal Act, decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered in or erased from the register, whether such question arises between two or more holders or alleged

are a joint stock company incorporated under the Joint Stock Companies Acts, 1856, 1857, and the plaintiff subscribed the memorandum of association of the said company for —— shares in the said company and took and became proprietor of the said shares [*or*, became and was the transferree and proprietor of —— shares in the said company], and became and was entitled to have his name entered in the register of shareholders of the said company as a shareholder in respect of the said shares, according to the provisions of the said statutes in that behalf; and all conditions have been performed, and all things have happened, and all times have elapsed, necessary to entitle the plaintiff to have his name entered by the defendants in the register of shareholders of the said company as a shareholder in respect of the said shares; yet the defendants neglected to enter and made default in entering the name of the plaintiff in the register of shareholders of the said company as a shareholder in respect of the said shares; whereby the plaintiff has been deprived of his title to the said shares, and has been prevented from selling and transferring the same, and has lost the profits which he would otherwise have made from the sale and transfer thereof, and has been prevented from receiving the dividends and profits due upon the said shares.

A like count against a company constituted under a private Act: Daly v. *Thompson*, 10 M. & W. 309.

A like count with a claim for a mandamus, under the C. L. P. Act, 1854, *to compel the company to register the plaintiff as a shareholder: Norris* v. *Irish Land Co.*, 27 L. J. Q. B. 115; 8 E. & B. 512; *Copeland* v. *North-Eastern Ry. Co.*, 6 E. & B. 277. *See post*, "*Mandamus.*"

Against a company for neglecting to register shares in the name of the plaintiff, the purchaser of them, whereby they became forfeited for non-payment of calls: Catchpole v. *Ambergate Ry. Co.*, 1 E. & B. 111.

Against a company for wrongfully declaring the plaintiff's shares forfeited and selling them: Catchpole v. *Ambergate Ry. Co.*, 1 E. & B. 111; *Cockerell* v. *Van Diemen's Land Co.*, 18 C. B. 454.

Conspiracy.

See post, "*Malicious Prosecution:*" *and see Barber* v. *Lesiter*, 7 C. B. N. S. 175; 29 L. J. C. P. 161; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163.

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holders of shares or stock, or between any holders or alleged holders of shares or stock and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

The court is bound to exercise this jurisdiction if called upon. (Ex. p. *Swan*, 30 L. J. C. P. 113.) The plaintiff may also proceed against the company by action, or by mandamus. (See *post*, "*Mandamus.*")

Conversion of Goods or Trover (*a*).

Count for the Wrongful Conversion of Goods (Trover). (C. L. P. Act, 1852, Sched. B. 28.)

That the defendant converted to his own use, or wrongfully de-

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(*a*) *Conversion of goods, or trover.*]—This form of action is called *trover* from the original form of the declaration, when it was applicable only to cases of goods lost and found, and converted by the finder to his own use. When this form of action was extended to all conversions of goods, whether ensuing upon a loss and finding or not, the averment of the loss and finding inserted in the count became fictitious. (1 Chit. Pl. 7th ed. 163.) Since the C. L. P. Act, 1852, has abolished this fictitious averment, the cause of action may perhaps be more correctly designated by the real name of the injury, as a *conversion* of goods, which is the term adopted in the schedule to the Act.

A conversion is a wrongful interference with goods, as by taking, using, or destroying them, inconsistent with the owner's right of possession. (*Fouldes* v. *Willoughby*, 8 M. & W. 540; *Thorogood* v. *Robinson*, 6 Q. B. 769; *Jones* v. *Brown*, 25 L. J. Ex. 345; *Simmons* v. *Lillystone*, 8 Ex. 431; *Heald* v. *Carey*, 11 C. B. 977; *Burroughes* v. *Bayne*, 29 L. J. Ex. 185; 5 H. & N. 296.) To constitute this injury there must be some repudiation by the defendant of the owner's right, or some exercise of dominion inconsistent with it. (*Ib.*) Where the conversion cannot be proved by any positive act, it may be inferred from proof of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the control over them at the time. (*Philpott* v. *Kelley*, 3 Ad. & E. 106; *Verrall* v. *Robinson*, 2 C. M. & R. 495; *M'Kewen* v. *Cotching*, 27 L. J. Ex. 41; *Walker* v. *Clyde*, 10 C. B. N. S. 381. As to the effect of a qualified demand or refusal, see *Alexander* v. *Southey*, 5 B. & Ald. 247; *Cranch* v. *White*, 1 Bing. N. C. 414; *Rushworth* v. *Taylor*, 3 Q. B. 699; *Davies* v. *Vernon*, 6 Q. B. 443; *Lee* v. *Bayes*, 18 C. B. 599; *Clark* v. *Chamberlain*, 2 M. & W. 78; *Burroughes* v. *Bayne*, *supra*.) An act of conversion differs from a mere trespass, inasmuch as the former must amount to a deprivation of the possession to such an extent as to be inconsistent with the right of the owner, and evidencing an intention to deprive him of that right; whereas the latter includes every direct forcible injury or act disturbing the possession without the consent of the owner, however slight or temporary the act may be. (*Fouldes* v. *Willoughby*, 8 M. & W. 540; and see per Parke, J., *Smith* v. *Goodwin*, 4 B. & Ad. 420; and see *Burroughes* v. *Bayne*, *supra*.)

This action cannot in general be supported against a bailee or person entrusted with the possession of goods for a special purpose, for a mere omission or negligence in the course of the employment; thus a loss of goods by a carrier is not a conversion. (2 Wms. Saund. 47 *i.*; *Ross* v. *Johnson*, 5 Burr. 2825; *Williams* v. *Gesse*, 3 Bing. N. C. 849); but if the bailee deals with the goods in a manner inconsistent with the purpose for which they are held, he may be guilty of a conversion, as where a carrier delivers goods to the wrong person. (*Ib.*; *Devereux* v. *Barclay*, 2 B. & Ald. 702; *Stephenson* v. *Hart*, 4 Bing. 476, 483; *Wyld* v. *Pickford*, 8 M. & W. 443.)

To support this action the plaintiff must have the right to the immediate possession of the goods, and not merely a property in reversion. (*Bradley* v. *Copley*, 1 C. B. 685.) Therefore the owner of goods let to another for a term still continuing cannot maintain this action (*Gordon* v. *Harper*, 7 T. R. 9); nor can the owner of goods in the possession of another who is entitled to a lien upon them (*Milgate* v. *Kebble*, 3 M. & G. 100); but any

prived the plaintiff of the use and possession of the plaintiff's

special or temporary ownership with immediate possession, as under a lien, is sufficient to maintain the action. (*Legg* v. *Evans*, 6 M. & W. 36.) So where goods are bailed to another for hire, the bailee would be the proper person to sue for a conversion by a third party; but where the bailee determines the bailment by any act inconsistent with it, as by selling the goods to a third party, the bailor may at once sue the purchaser (*Cooper* v. *Willomatt*, 1 C. B. 672.); and where the goods were, pending the bailment, taken in execution for a debt of the bailee, the bailment was thereby determined and the bailor was entitled to sue the bailee for a conversion (*Bryant* v. *Wardell*, 2 Ex. 479); and where the bailee became bankrupt and his assignees sold the goods, the bailor was entitled to sue them for the conversion. (*Penn* v. *Bittleston*, 7 Ex. 152.) A person having a special property in goods, with immediate possession, as a bailee, may maintain an action against the absolute owner for a wrongful conversion, but can only recover damages in respect of his limited interest. (*Brierly* v. *Kendall*, 17 Q. B. 937; and see *Turner* v. *Hardcastle*, 31 L. J. C. P. 193.)

Upon any bailment of goods which does not exclude the absolute owner's right to the immediate possession, either the bailor or the bailee may maintain an action for a conversion by a third party. (*Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Rooth* v. *Wilson*, 1 B. & Ald. 59.)

A joint owner of goods cannot maintain this action against his co-owner in respect of any act of the latter consistent with his ownership, but if the latter is guilty of an act inconsistent with joint ownership as a complete destruction of the goods or a sale of them in market overt, it amounts to a conversion for which the joint owner can sue. (2 Wms. Saund. 47 *o.*; *Higgins* v. *Thomas*, 8 Q. B. 908; *Jones* v. *Brown*, 25 L. J. Ex. 345; *Mayhew* v. *Herrick*, 7 C. B. 229; and see *post*, "*Conversion*," c. VI.)

As possession in fact is evidence of the right of possession, it is sufficient to maintain the action against a wrongdoer who cannot show a better title in himself or authority under better a title. (*Elliott* v. *Kemp*, 7 M. & W. 312; *Northam* v. *Bowden*, 11 Ex. 70; *Armory* v. *Delamirie*, 1 Smith's L. C. 5th ed. 301.) But if a plaintiff is not in possession at the time of the conversion and has to rely upon his right only, he must then be able to prove a good title in order to maintain the action. In the latter case the defendant might rebut the plaintiff's title by showing a *jus tertii* (*Gadsden* v. *Barrow*, 9 Ex. 514; *Leake* v. *Loveday*, 4 M. & G. 972), which he could not do in the former, where he has disturbed the actual possession of the plaintiff, unless he could justify under the authority of the third party. (*Jeffries* v. *Great Western Ry. Co.* 25 L. J. Q. B. 107; 5 E. & B. 802; *White* v. *Mullett*, 6 Ex. 713.)

The owner of a future or reversionary interest in goods may maintain an action for any injury to his reversionary right, but must sue as reversioner. See *post*, "*Reversion*."

The action for conversion lies only in respect of specific personal property; it will not lie for money, though certain in amount, unless it be identified in specie. (*Orton* v. *Butler*, 5 B. & Ald. 652; and see *Foster* v. *Green*, 31 L. J. Ex. 158.) It does not lie for fixtures, *eo nomine*, as they form part of the land, and therefore cannot be converted. (*Davis* v. *Jones*, 2 B. & Ald. 165; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Weeton* v. *Woodcock*, 5 M. & W. 587; *Mackintosh* v. *Trotter*, 3 M. & W. 186; *Wilde* v. *Waters*, 24 L. J. C. P. 193; 16 C. B. 637.) But a count may be framed for wrongfully depriving the plaintiff of his right to remove them. (*London and Westminster Loan Co.* v. *Drake*, 6 C. B. N. S. 798; 28 L. J. C. P. 297; see *post*, "*Fixtures*." If they have been reduced to the state of movable goods by severance, they become capable of being converted; and although they ought not to be described by the technical term fixtures, yet a declaration for the conversion of fixtures has been held good after verdict. (*Sheen* v. *Rickie*, 5 M. &

goods; that is to say, iron, hops, household furniture [*or as the case may be*].

W. 175; 7 Dowl. 335; and see *Niblet* v. *Smith*, 4 T. R. 504; *Dalton* v. *Whittem*, 3 Q. B. 961; *Wiltshear* v. *Cottrell*, 1 E. & B. 674.) So it will lie for soil taken up from the land and *removed*. (*Higgon* v. *Mortimer*, 6 C. & P. 616.)

The goods should be described in the declaration with sufficient certainty to inform the defendant as to the nature of the goods taken. (*Taylor* v. *Wells*, 2 Wms. Saund. 74; *Pope* v. *Tillman*, 7 Taunt. 642; *Sheen* v. *Rickie*, 7 Dowl. 335.) But they may be described generally as in the above form taken from schedule (B) to the C. L. P. Act, 1852, and by s. 49 of that Act statements of quantity, quality and value, where these are immaterial are to be omitted. Where the plaintiff succeeds as to some of the goods laid in the declaration only, the defendant is entitled to have the verdict entered for him as to the residue, and is entitled to the costs in respect thereof if any have been incurred. (*Williams* v. *Great Western Ry. Co.*, 1 Dowl. N. S. 16; *Freshney* v. *Wells*, 26 L. J. Ex. 228.)

The measure of damages in this action is not necessarily the value of the goods, but the compensation for the loss actually sustained; thus where a vendee sued the vendor for a conversion of the goods sold, the goods not having been delivered and price not having been paid, and not being recoverable by the vendor by reason of the conversion, the measure of damages was held to be the difference between the value of the goods and the contract price, that is to say, the same as in an action for the breach of contract in not delivering the goods. (*Chinery* v. *Viall*, 29 L. J. Ex. 180; 5 H. & N. 288; but where after delivery of the goods to the vendee, the vendor retook them, the vendee was held entitled to recover the full value of the goods though the price had not been paid: the price being recoverable by the vendor in full. (*Gillard* v. *Brittan*, 8 M. & W. 575; and see *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; *ante*, "Sale of Goods," p. 211.) Where a person having a special property in goods sues the absolute owner for a wrongful conversion, he is only entitled to recover damages to the extent of his limited interest (*Brierly* v. *Kendall*, 17 Q. B. 937); but in an action against a stranger who is guilty of a conversion he is entitled to recover the full value of the goods. (*Turner* v. *Hardcastle*, 31 L. J. C. P. 193.)

Special damage, not necessarily incidental to the wrongful conversion of the goods, may be claimed in this action; it must be stated in the declaration in the usual way. (*Moon* v. *Raphael*, 2 Bing. N. C. 310; *Bodley* v. *Reynolds*, 8 Q. B. 779.) By the 3 & 4 Will. IV. c. 42, s. 29, in all actions of trover the jury may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure.

The form of declaration given in the schedule of the C. L. P. Act, 1852, runs in the alternative, "converted to his own use, *or* wrongfully deprived the plaintiff," etc. The charge of wrongful deprivation would probably be construed to be merely an explanation or amplification of the conversion, and not to form a distinct cause of action. Any other construction might raise considerable difficulty as to the effect of the general issue. It is not unusual in practice to join both statements by the word "and" instead of "or." (Chit. Forms, 9th ed. 96, n. (*a*); *Baker* v. *Gray*, 17 C. B. 462; and see per Willes, J., *London and Westminster Loan Co.* v. *Drake*, 28 L. J. C. P. 297, 298.)

By the C. L. P. Act, 1852, s. 49, the statement of losing and finding, and bailment in actions for goods or their value is to be omitted.

In this action the court will sometimes exercise a summary jurisdiction to stay proceedings upon a return of the goods and payment of nominal damages and costs, and on such other terms as the court thinks proper to impose: as to which, see 2 Chit. Pr. 11th ed. p. 1367.

Count for the conversion of scrip certificates: Acraman v. *Cooper*, 10 M. & W. 585; *of an agreement of guarantee: M'Leod* v. *M'Ghie*, 2 M. & G. 326; *of a ship, tackle, stores, etc.: Reid* v. *Fairbanks*, 13 C. B. 692; *of a delivery order for goods: Godts* v. *Rose*, 17 C. B. 229; *of halves of bank-notes sent in inchoate payment of a debt: Smith* v. *Mundy*, 29 L. J. Q. B. 172.

Count for the conversion of carpenter's tools, stating as special damage that the plaintiff was prevented from working: Bodley v. *Reynolds*, 8 Q. B. 779; *of fixtures taken as a distress: Dalton* v. *Whittem*, 3 Q. B. 961.

Count for the conversion of dead grouse: Earl of Lonsdale v. *Rigg*, 25 L. J. Ex. 73; 26 L. J. Ex. 196; *of rabbits: Blades* v. *Higgs*, 31 L. J. C. P. 151. [*As to the property in game and animals feræ naturæ, see the above cases, and see also Sutton* v. *Moody*, 1 L. Raym. 250; *Churchward* v. *Studdy*, 14 East, 249.]

Count by the Assignees of a Bankrupt for a Conversion before the Bankruptcy.

(*Commence with the form, ante, p.* 19.) That the defendant, before the said *E. F.* became bankrupt, converted to his own use or wrongfully deprived the said *E. F.* of the use and possession of goods which were then of the said *E. F.*, that is to say, iron, hops, household furniture [*or as the case may be. In this case the plaintiffs must sue as assignees. A count may be added for any conversion after the bankruptcy, as in the next form, if the plaintiffs sue in respect of it as assignees* (*Williams* v. *Vines*, 1 D. & L. 710).]

Count by the Assignees of a Bankrupt for a Conversion after the Bankruptcy.

(*Commence with the form, ante, p.* 19.) That the defendant, after the said *E. F.* became bankrupt, converted to his own use or wrongfully deprived the plaintiffs, as such assignees as aforesaid, of the use and possession of goods of the plaintiffs as such assignees as aforesaid, that is to say, iron, hops, household furniture [*or as the case may be. In this case the plaintiffs may sue either as assignees or in their individual capacity.*]

A like count: Baker v. *Gray*, 17 C. B. 462.

A special count by the assignees of a bankrupt in respect of the conversion of goods of another person in the order and disposition of the bankrupt at the time of the bankruptcy: Graham v. *Furber*, 14 C. B. 134, 410.

Count by the Assignees of an Insolvent for a Conversion before the Insolvency.

(*Commence with the form, ante, p.* 19.) That the defendant, before the said *E. F.* was divested of his debts, estate, and effects under the said statutes, converted to his own use or wrongfully deprived

the said *E. F.* of the use and possession of goods which were then of the said *E. F.*, that is to say, iron, hops, household furniture [*or as the case may be.*]

A like count by the assignees of an insolvent for a conversion after the insolvency: Chilton v. *Carrington*, 16 C. B. 206.

Count by the assignees of an insolvent for a conversion before the insolvency, joined with a count for a conversion after the insolvency: Sheen v. *Rickie*, 5 M. & W. 175; *Hernamann* v. *Barber*, 15 C. B. 774.

Count by an Executor or Administrator for a Conversion in the Lifetime of the Testator or Intestate.

(*Commence with one of the forms, ante, pp.* 12, 14.) That the defendant, in the lifetime of the said *C. D.*, converted to his own use or wrongfully deprived the said *C. D.* of the use and possession of goods then of the said *C. D.*, that is to say, iron, hops, household furniture [*or as the case may be. In this case the plaintiff must sue in his representative character. If there has also been a conversion since the death a count may be added as in the next form, if the plaintiff sues in respect of it in his representative character*].

Count by an Executor or Administrator for a Conversion after the Death of the Testator or Intestate.

(*Commence with one of the forms, ante, p.* 12, 14.) That the defendant, after the death of the said *C. D.*, converted to his own use or wrongfully deprived the plaintiff, as such executor [*or* administrator] as aforesaid, of the use and possession of goods of the plaintiff as such executor [*or* administrator] as aforesaid, that is to say, iron, hops, household furniture [*as the case may be. In this case the plaintiff may sue either in his representative character or in his individual capacity*].

Against an Executor or Administrator for a Conversion by the Testator.

(*Commence with one of the forms, ante, pp.* 13, 15.) That the said *G. H.*, in his lifetime and within six calendar months next before his death, converted to his own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, iron, hops, household furniture [*or as the case may be*]; and this action was commenced within six calendar months next after the defendant as such executor [*or* administrator] as aforesaid took upon himself the administration of the estate and effects of the said *G. H.* [*As to this action against executors or administrators, see post,* "*Executors,*" *p.* 283, *n.* (*a*).]

Count by Husband and Wife for a Conversion of the Wife's Goods before Marriage (*a*).

(*Commence with the form, ante, p.* 17.) That the defendant con-

(*a*) After the bankruptcy of the husband he cannot sue in respect of causes of action vested in him in right of his wife, which if vested in him

verted to his own use or wrongfully deprived the said *C.*, whilst she was unmarried, of the use and possession of goods then of the said *C.*, that is to say, iron, hops, household furniture [*or as the case may be.*]

Count against Husband and Wife for a Conversion by the Wife before Marriage.

(*Commence with the form, ante, p.* 17.) That the said *C.*, whilst she was unmarried, converted to her own use or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, iron, hops, household furniture [*or as the case may be*].

Against husband and wife for a conversion by the wife during marriage: Catterall v. *Kenyon*, 3 Q. B. 310.

Copyright (*a*).

For Infringing the Copyright in a Book by Printing Copies. (5 & 6 *Vict. c.* 45, *s.* 15.)

That the plaintiff was the proprietor of a subsisting copyright in a book entitled ——, and the defendant, after the passing of the Act of Parliament passed in the sixth year of the reign of Queen Victoria to amend the law of copyright, did, without the consent in writing of the plaintiff so then being such proprietor as aforesaid and contrary to the said statute, print and cause to be printed for sale [and for exportation] divers copies of the said book; whereby the plaintiff has been prevented from selling divers copies of the

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alone would pass to his assignees. The assignees of the bankrupt husband must join with the wife in suing for a conversion of the wife's goods before marriage. (*Richbell* v. *Alexander*, 30 L. J. C. P. 268; 10 C. B. N. S. 324; and see *Yates* v. *Sherrington*, 12 M. & W. 855; and see *ante*, p. 148.)

(*a*) Copyright in works of literature after publication exists only by statute. (See *Jefferys* v. *Boosey*, 4 H. L. C. 876; *Reade* v. *Conquest*, 9 C. B. N. S. 755.)

Copyright is regulated by the following statutes:—

By 5 & 6 Vict. c. 45, as to books, which includes "every volume, or part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan published separately" (s. 2), an action for the infringement is given by s. 15.

As to oral lectures, by 5 & 6 Will. IV. c. 65; 6 & 7 Vict. c. 65.

As to dramatic pieces and musical performances, by 3 & 4 Will. IV. c. 15, and the above statute 5 & 6 Vict. c. 45, ss. 20, 21.

Also engravings and prints, sculptures, models, copies and casts, and designs for ornamenting articles of manufacture, are respectively protected by various statutes: 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 14 & 15 Vict. c. 8; 15 & 16 Vict. c. 6; 21 & 22 Vict. c. 70, (under which latter Act, s. 9, the action may be brought in the county court.)

International copyright is regulated by 7 & 8 Vict. c. 12.

said book, and his profits in the said copyright have been diminished (*a*).

Like counts: Boosey v. *Davidson*, 4 D. & L. 147; *Sweet* v. *Benning*, 16 C. B. 459; *and see post*, "*Injunction.*"

For Infringing the Copyright in a Book by selling Copies unlawfully printed.

That the plaintiff was the proprietor of a subsisting copyright in a book entitled ——, and after the passing of the Act of Parliament passed in the sixth year of the reign of Queen Victoria to amend the law of copyright divers copies of the said book had, without the consent in writing of the plaintiff so then being such proprietor as aforesaid and contrary to the said statute, been printed by one *G. H.* for sale; and the defendant, well knowing the premises, afterwards without the consent in writing of the plaintiff so being such proprietor as aforesaid and contrary to the said statute, sold [and published and exposed to sale and hire] divers copies of the said book which had been so printed as aforesaid; whereby the plaintiff was prevented from selling divers copies of the said book, and his profits in the said copyright have been diminished.

Like counts: Wright v. *Tallis*, 1 C. B. 893; *Boosey* v. *Davidson*, 4 D. & L. 147.

Count for infringing the copyright of a musical composition by printing it for sale: Clementi v. *Walker*, 2 B. & C. 861; *Jeffreys* v. *Boosey*, 24 L. J. Ex. 81; *Cocks* v. *Purday*, 5 C. B. 860; *Boosey* v. *Purday*, 4 Ex. 145.

For infringing the copyright of a song, with a likeness of the singer on the outside leaf, by printing and selling imitations: Chappell v. *Davidson*, 25 L. J. C. P. 225; 18 C. B. 194.

For infringing the copyright of a song by gratuitous circulation: Novello v. *Sudlow*, 12 C. B. 177.

For infringing the copyright of a print: Brooks v. *Cocks*, 3 A. & E. 138; *West* v. *Francis*, 5 B. & Al. 737.

For selling a print from a spurious plate, under 17 *Geo. III. c.* 57 (*held to lie without guilty knowledge*): *Gambart* v. *Sumner*, 5 H. & N. 5; 29 L. J. Ex. 98.

For infringing the copyright of a bust: Gahagan v. *Cooper*, 3 Camp. 112.

Counts for infringing a design for an article of manufacture, within 6 *&* 7 *Vict. c.* 65: *Millengen* v. *Picken*, 1 C. B. 799.

Count for the infringement of a design registered under 5 *&* 6 *Vict. c.* 100: *Harrison* v. *Taylor*, 27 L. J. Ex. 315; 3 H. & N. 301; 4

(*a*) It is frequently advisable to add a count in trover or in detinue under the 5 & 6 Vict. c. 45, s. 23, which provides that all copies of the book unlawfully printed or imported shall be deemed the property of the proprietor of the copyright, and he may, after demand in writing, sue for and recover the same and damages for the detention in detinue, or damages for the conversion in trover.

A claim for an injunction may also be added if required. (See form, *post*, "*Injunction.*")

H. & N. 815; *Heywood* v. *Potter*, 1 E. & B. 439; *Norton* v. *Nicholls*, 28 L. J. Q. B. 225; *see Pleas*, ib.

Count for infringing the copyright of a print under the International Copyright Act: Avanzo v. *Mudie*, 10 Ex. 203.

Count for penalties for infringing the copyright of a dramatic piece under 3 & 4 Will. IV. c. 15 (a): Fitzball v. *Brooke*, 6 Q. B. 873; *Shepherd* v. *Conquest*, 27 L. J. C. P. 127; 17 C. B. 427; *Morton* v. *Copeland*, 16 C. B. 517; *Hatton* v. *Kean*, 29 L. J. C. P. 20; 7 C. B. N. S. 268; *Reade* v. *Conquest*, 9 C. B. N. S. 755; *Cumberland* v. *Copeland*, 31 L. J. Ex. 19; 7 H. & N. 118.

Corporation (*b*).

As to actions by and against corporations, see *ante*, p. 21.

(*a*) Dramatizing and representing a novel on the stage is not an infringement of the literary copyright in the novel. (*Reade* v. *Conquest*, 30 L. J. C. P. 209; 9 C. B. N. S. 755.) But where the plaintiff wrote a drama and then turned it into a novel, and the defendant dramatised and represented the novel, without knowing of the plaintiff's drama, it was held an infringement of the dramatic copyright of the plaintiff. (*Reade* v. *Lacy*, 30 L. J. C. 655; *Reade* v. *Conquest*, 31 L. J. C. P. 153.)

(*b*) An action will lie against a corporation for a wrong which they cause to be committed, as a trespass to the person, or to land, or goods, or a conversion or detention of goods; and the authority of their agent may be proved against the corporation without necessarily showing an appointment under seal. (*Yarborough* v. *Bank of England*, 16 East, 6; *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526; *Maund* v. *The Monmouthshire and Staffordshire Canal Co.*, 2 Dowl. N. S. 113; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314; *Goff* v. *Great Northern Ry. Co.*, 30 L. J. Q. B. 148.) An action for a wrong will lie against a corporation where the matter complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if done by an individual; as an action against a company conducting an electric telegraph for publishing a libellous message (*Whitfield* v. *South Eastern Ry. Co.*, 27 L. J. Q. B. 229); an action against a company engaged in running omnibuses for driving them in such a manner as to obstruct the plaintiff in the use of the highway. (*Green* v. *London General Omnibus Co.*, 29 L J. C. P. 13; 7 C. B. N. S. 290.) But it has not been decided whether an action will lie against a corporation for a malicious prosecution. (*Stevens* v. *Midland Ry. Co.*, 10 Ex. 352.) An action lies against a corporation for damages sustained through their negligence in the performance or non-performance of their duties. (*Henly* v. *Mayor of Lyme*, 5 Bing. 91.)

Corporations, trustees, commissioners, etc., entrusted with public duties which they perform gratuitously and not for their own profit, are not liable for the consequences of their acts done in the performance of their duties, unless they have exceeded their authority, or have omitted to do their duty,

COUNTY COURTS (*a*).

or have done it negligently or oppressively (*Sutton* v. *Clarke*, 6 Taunt. 29; *Boulton* v. *Crowther*, 2 B. & C. 703; *Ruck* v. *Williams*, 27 L. J. Ex. 357; 3 H. & N. 308; *Metcalf* v. *Hetherington*, 24 L. J. Ex. 314; 11 Ex. 257; *Gibbs* v. *Trustees of Liverpool Docks*, 3 H. & N. 164; 27 L. J. Ex. 321; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765); so they are not liable for the negligence or tortious acts of servants and contractors necessarily employed by them, provided they have not been guilty of any negligence in selecting or appointing them. (*Hall* v. *Smith*, 2 Bing. 156; *Scott* v. *Mayor of Manchester*, 2 H. & N. 204; 26 L. J. Ex. 132; and see *post*, "*Negligence*.")

An action will lie at the suit of a corporation for a libel. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201; 4 H. & N. 87.)

(*a*) By the 9 & 10 Vict. c. 95 (the Act for establishing the County Courts), s. 138, it is enacted, "for the protection of persons acting in the execution of this Act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed, and not afterwards, or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant." (See "*Notice of Action*," *post*, ch. 6.)

By the 13 & 14 Vict. c. 61 (the Act extending the County Courts), s. 19, it is enacted, "that from and after the passing of this Act no action shall be brought against any high bailiff or bailiff, or against any person or persons acting by the order and in aid of any high bailiff, for anything done in obedience to any warrant under the hand of the clerk or clerks of the said court and the seal of the said court, until demand hath been made or left at the office of such high bailiff by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such high bailiff, bailiff, or other person or persons acting in his aid for any such cause as aforesaid, without making the clerk or clerks of the said court who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction or other irregularity in the said warrant; and if such action be brought jointly against such clerk or clerks and also against such high bailiff or bailiff, or other person or persons acting in his or their aid as aforesaid, then on proof of such warrant the jury shall find for such high bailiff or bailiff, and for such person or persons so acting as aforesaid, notwithstanding such defect or irregularity as aforesaid; and if the verdict shall be given against the said clerk or clerks, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid; and if any action shall be

Defamation; Libel and Slander (*a*).

Count for a Libel. (*C. L. P. Act*, 1852, *Sched. B.* 33.)

That the defendant falsely and maliciously printed and published

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brought the defendant or defendants shall and may plead the general issue, and give the special matter in evidence at any trial had thereupon."

By the 15 & 16 Vict. c. 54, (an Act to facilitate and arrange proceedings in County Courts) s. 6, it is enacted, that "if any action or suit shall be brought against any person for anything done in pursuance of this Act, or of any other Act relating to County Courts, such person may plead the general issue, and give the special matter in evidence; and the warrant under the seal of the County Court, being produced in any such action or suit, shall be deemed sufficient proof of the authority of the said County Court previous to the issuing of such warrant; and in case the plaintiff in such action shall have a verdict pass against him, be nonsuit, or discontinue the action or suit, the defendant shall in any of the said cases be allowed full costs as between attorney and client."

By the 19 and 20 Vict. c. 108, s. 3, the above Acts are all to be construed together as one Act.

(*a*) *Libel and Slander.*]—*Libel* consists in the publication by the defendant of matter defamatory to the plaintiff, by means of printing, writing, pictures, or the like signs. (3 Bl. Com. 125.)

Slander consists in the publication by the defendant of matter defamatory to the plaintiff by means of words spoken. (3 Bl. Com. 123.)

The nature of the defamatory matter which is actionable in a written publication, or libel, and that which is actionable when spoken, with the distinction between them, may be seen from the references to cases given above, which have been classed under the following descriptions.

Matter imputing criminal offences. This is actionable equally in the form of libel and of slander.

Matter imputing misconduct in the discharge of a public office. This is also actionable both as libel and as slander.

Matter imputing misconduct, or want of care or of qualification or of skill in a profession, trade, or business. This is also actionable both as libel and as slander.

Matter imputing conduct or qualities tending to degrade or disparage the plaintiff, or exposing him to public hatred, contempt, or ridicule, is actionable as libel when published in print, writing, or other permanent form, but not as slander, when merely spoken. (See *Thorley* v. *Kerry*, 4 Taunt. 364; *Clement* v. *Chivis*, 9 B. & C. 175; *Parmiter* v. *Coupland*, 6 M. & W. 105, 108.)

Defamatory words merely spoken and not actionable under any of the above descriptions, but which cause special damage to the plaintiff, are actionable as slander. (See *Kelly* v. *Partington*, 5 B. & Ad. 645.)

Whether matter, written or spoken, is defamatory, within the above descriptions, is a question for the jury. It is for the judge to direct the jury what constitutes defamation in law, and for the jury to say whether, according to such direction, the matter in question is defamatory. (See 32 Geo. III. c. 60; *Parmiter* v. *Coupland*, 6 M. & W. 105; *Baylis* v. *Lawrence*, 11 A. & E. 920; per Williams, J., *Paris* v. *Levy*, 9 C. B. N. S. 342, 352.) The judge may state his opinion to the jury whether the matter is defamatory, but he is not bound to do so. (*Ib.*)

Privileged communications.]—On certain occasions a person is privileged to write or speak according to the best of his belief, and he is not liable to an action for matter written or spoken on such privileged occasions, al-

of the plaintiff, in a newspaper called "——," the words following,

though it be false; unless he has written or spoken maliciously in fact and not by reason of the privilege, as where he has asserted false and defamatory matter knowing it to be false. On such occasions of privilege it is not sufficient for the plaintiff to prove the falseness of the matter merely; but he must also show that the defendant acted or spoke on the occasion with a malicious intent. (*Hemmings* v. *Gasson*, 27 L. J. Q. B. 252.) The occasion of privilege is a question for the judge; the existence of express malice, for the jury. (*Cooke* v. *Wildes*, 5 E. & B. 328; *Huntley* v. *Ward*, 6 C. B. N. S. 514.)

The following are some of the principal occasions of privilege:—

Speeches and proceedings in Parliament are privileged. (*R.* v. *Creevey*, 1 M. & S. 273; *Lake* v. *King*, 1 Wms. Saund. 131 *b*; *Stockdale* v. *Hansard*, 9 A. & E. 1; per Campbell, C. J., *Davidson* v. *Duncan*, 26 L. J. Q. B. 104, 107.)

Reports of speeches or proceedings in Parliament are not in general privileged (*Ib.*); but the publication of reports, papers, votes, or proceedings of either House by the authority of the House is protected by the statute 3 & 4 Vict. c. 9, s. 1; and any copy or extract from such publications is privileged by that statute, ss. 2, 3.

Reports of public meetings are not privileged. (*Davidson* v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104.) A report in a newspaper of the proceedings at a Vestry meeting held under the Metropolis Local Management Act is not privileged, although the vestry is bound by their Act to publish the same matter. (*Popham* v. *Pickburn*, 31 L. J. Ex. 133.)

Statements made by counsel in the course of *judicial proceedings* if relevant to the subject-matter and based upon his instructions, and also fair comments made by counsel upon the case are privileged. (*Hodgson* v. *Scarlett*, 1 B. & Ald. 232; *Needham* v. *Dowling*, 15 L. J. C. P. 9.) An attorney acting as an advocate has the same privilege as counsel. (*Mackay* v. *Ford*, 29 L. J. Ex. 404; 5 H. & N. 792.) So statements and comments made by a judge relevant to the proceedings are privileged (*Jekyll* v. *Moore*, 2 B. & P. N. R. 341); or by a coroner (*Thomas* v. *Chirton*, 31 L. J. Q. B. 139). Statements made by a witness, whether orally or by affidavit, in the course of judicial proceedings, if relevant to the proceedings, are absolutely privileged though false to his own knowledge and malicious in fact. (*Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Bromhead*, 28 L. J. Ex. 36; 4 H. & N. 569; and see further as to the privilege of judicial proceedings, *Lake* v. *King*, 1 Wms. Saund. 131 *b* (1).)

Statements made in the course of an official inquiry and relevant to the matter of the inquiry are privileged. (*Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J. Ex. 430.)

Fair reports of trials in any public court of justice are privileged. (*Hoare* v. *Silverlock*, 9 C. B. 20; *Lewis* v. *Levy*, 27 L. J. Q. B. 282, 288.) A report of an *ex parte* application for a criminal information which was refused was held privileged. (*Curry* v. *Walter*, 1 B. & P. 525.) Fair reports of preliminary inquiries before magistrates, sitting in public, where the accused was discharged, are privileged. (*Lewis* v. *Levy*, 27 L. J. Q. B. 282.) It has been held that reports of such inquiries where the accused was committed or held to bail for an indictable offence are not privileged. (*Duncan* v. *Thwaites*, 3 B. & C. 556; but see *Lewis* v. *Levy*, 27 L. J. Q. B. 282, 291.) A report of a matter brought before a magistrate not in his judicial or magisterial character, as an application to a magistrate for advice is not privileged. (*M'Gregor* v. *Thwaites*, 3 B. & C. 24.)

Complaints or applications for redress made in a proper quarter, by parties interested in the matter, are privileged, as a complaint of the conduct of a magistrate made to the Secretary of State (*Harrison* v. *Bush*, 25 L. J. Q. B. 25; 5 E. & B. 344; and see *Blagg* v. *Sturt*, 10 Q. B. 899); a petition to Parlia-

that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved and was in

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ment (*Lake* v. *King*, 1 Wms. Saund. 131 *b*); a petition addressed by a creditor of an officer in the army to the Secretary of War with a view of obtaining payment of his debt (*Fairman* v. *Ives*, 5 B. & Ald. 642).

Confidential communications made by way of advice to protect the interests of the persons to whom they are made, at their request, are privileged, as the character of a servant given to a person asking it (*Weatherston* v. *Hawkins*, 1 T. R. 110; *Child* v. *Affleck*, 9 B. & C. 403); or the voluntary communication to the latter of a fact subsequently discovered (*Gardner* v. *Slade*, 13 Q. B. 796). It would also seem that such statements voluntarily made to a person respecting the conduct of a person in his employ, or whom he was likely to take into his employ, or with whom he is otherwise connected, are privileged. (See *Pattison* v. *Jones*, 8 B. & C. 578; *M'Dougall* v. *Claridge*, 1 Camp. 267; and see *Coxhead* v. *Richards*, 2 C. B. 569; *Amann* v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313.) A statement of opinion made to a tradesman in answer to his inquiry respecting the handwriting of a fictitious order for goods which purported to have been sent by the person making the statement was held to be privileged. (*Croft* v. *Stevens*, 31 L. J. Ex. 143.)

Statements made by a person in the conduct of his affairs for the protection of his own interests are privileged. As a complaint by a person that his property had been stolen by another made in a proper quarter to obtain redress (*Toogood* v. *Spyring*, 1 C. M. & R. 181; *Amann* v. *Damm*, 29 L. J. C. P. 313); or made to the supposed thief himself, though in the presence of a third party (*Toogood* v. *Spyring*, 1 C. M. & R. 181; *Padmore* v. *Lawrence*, 11 A. & E. 380); or made to the servants of the complainant by way of warning (*Somerville* v. *Hawkins*, 10 C. B. 583). A charge of bankruptcy made against a trader by his creditor to a person employed by the trader to sell his goods, with a notice not to pay over to him the produce of the sale, was held privileged. (*Blackman* v. *Pugh*, 2 C. B. 611.)

Fair and reasonable criticism of literary publications not involving an attack on private character is privileged. (*Tabart* v. *Tipper*, 1 Camp. 350; *Carr* v. *Hood*, 1 Camp. 354 *n*; *Paris* v. *Levy*, 30 L. J. C. P. 11; 9 C. B. N. S. 342.)

Fair comments upon the public acts of a person filling a public office or character are privileged. (*Cooper* v. *Lawson*, 8 A. & E. 746; *Earl of Lucan* v. *Smith*, 1 H. & N. 481; 26 L. J. Ex. 94.) But comments on private acts of persons are not privileged. (*Gathercole* v. *Miall*, 15 M. & W. 319.)

The form of the declaration.]—The defamatory matter must be *false*, and must be so charged in the declaration; it is then presumed to have been published maliciously. (*Bromage* v. *Prosser*, 4 B. & C. 254; *Haire* v. *Wilson*, 9 B. & C. 643; *Fisher* v. *Clement*, 10 B. & C. 475; *Baylis* v. *Lawrence*, 11 A. & E. 920, 924; *Huntley* v. *Ward*, 6 C. B. N. S. 514.) The declaration usually charges the words to have been printed or spoken and published *maliciously*; but this is not strictly necessary, as the malice is sufficiently implied in law from the falseness of the defamatory words (*Ib.*); evidence of actual malice, though not essential to the cause of action, may be given to increase the damages (*Ib.*). The forms in the C. L. P. Act, 1852, sch. B. 32, 33, contain the word "maliciously," and it seems advisable to retain it.

The declaration must state that the words were spoken, or the libel was written "of the plaintiff," unless the matter itself spoken or published manifestly pointed out and applied to the plaintiff; otherwise the count would be bad even on error. (*Clement* v. *Fisher*, 7 B. & C. 459; *O'Brien* v. *Clement*, 4 D. & L. 563.) It is necessary to set out the words spoken or published exactly; and a count merely setting out their effect

the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious.

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would be bad in arrest of judgment. (*Gutsole* v. *Mathers*, 1 M. & W. 495; *Solomon* v. *Lawson*, 8 Q. B. 823; *R.* v. *Berry*, 4 T. R. 217; and see *M'Pherson* v. *Daniels*, 10 B. & C. 274; *Wood* v. *Adam*, 6 Bing. 481.) So a count charging a libel "in substance as follows" (*Wright* v. *Clements*, 3 B. & Ald. 503), or "purporting," etc. (*Wood* v. *Browne*, 6 Taunt. 169); so a count which charged that the defendant "asserted and accused the plaintiff of," etc. (*Cook* v. *Cox*, 3 M. & S. 110.) The slander or libel, if contained in a foreign language, should be set out in the original (*Zenobio* v. *Axtell*, 6 T. R. 162; *Jenkins* v. *Phillips*, 9 C. & P. 766); and should be translated with allegations of its actionable meaning; and the declaration should aver that the persons in whose presence it was spoken or to whom it was published understood the foreign language. (*Amann* v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313.)

Innuendo.]—Expressions which are actionable in their plain and ordinary meaning, as calling a man a "thief," saying that he has committed "perjury," etc., might always be alleged in the declaration simply, without any explanation. (*Harvey* v. *French*, 1 C. & M. 11; *Day* v. *Robinson*, 1 A. & E. 558; *Homer* v. *Taunton*, 29 L. J. Ex. 318, as in form, p. 267.) But where the words are innocent or uncertain in their natural meaning, and are actionable only in consequence of the peculiar meaning conveyed by them on the particular occasion, as calling a man a "lame duck," a "black sheep," or saying that he is "forsworn," or where words are used ironically, it is necessary to add a statement of the meaning intended by the words, whereby they are rendered actionable (as in the form above). This statement of the meaning is called an *innuendo*. (*Sweetapple* v. *Jesse*, 5 B. & Ad. 27; *Jackson* v. *Adams*, 2 Bing. N. C. 402.)

In cases of the latter kind, it was formerly necessary to insert in the declaration, by way of inducement, a prefatory averment of the meaning of the words, and then by the *innuendo* to allege that they were used to convey that meaning. (*Alexander* v. *Angle*, 1 C. & J. 143; *Day* v. *Robinson*, 1 A. & E. 554; *Gompertz* v. *Levy*, 9 A. & E. 282.) The innuendo could not enlarge the statement in the inducement (*Ib.*), though it might have the effect of restricting it. (*Sellers* v. *Till*, 4 B. & C. 655; *Goldstein* v. *Foss*, 6 B. & C. 154; S. C. in error, 4 Bing. 489.) Moreover, if the defendant disputed the meaning alleged in the inducement, it was necessary for him to traverse it, otherwise he was taken to admit that the words bore the meaning stated. (*Hemming* v. *Power*, 10 M. & W. 564; *M'Gregor* v. *Gregory*, 11 M. & W. 296.) By the plea of Not Guilty, the defendant denied only that on the particular occasion he used the words with that meaning. (*Broome* v. *Gosden*, 1 C. B. 728.) This introductory statement of the meaning imputed to the words has been rendered unnecessary by the 61st sect. of the C. L. P. Act, 1852, which enacts that "in actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient." (*Hemmings* v. *Gasson*, 27 L. J. Q. B. 252.) Whether the words are capable of the meaning alleged, is a question for the court; whether they, in fact, were used with that meaning is a question for the jury. (*Blagg* v. *Sturt*, 10 Q. B. 899; *Broome* v. *Gosden*, 1 C. B. 728; *Hemmings* v. *Gasson*, 27 L. J. Q. B. 252; *Barnett* v. *Allen*, 27 L. J. Ex. 412; 3 H. & N. 376.)

The damage.]—Where the defamatory words are actionable in themselves,

Like counts: Tighe v. *Cooper*, 26 L. J. Q. B. 215; 7 E. & B. 639; *Hemmings* v. *Gasson*, 27 L. J. Q. B. 252.

Count by husband and wife for slander of wife: see Saville v. *Sweeny*, 4 B. & Ad. 514.

(see *ante*, p. 262) it is not necessary to state any special damage, unless it is intended to claim it in addition to the general damages resulting from the injury. Where the defamatory words are actionable only in respect of the damage caused by them, the special damage must be stated in the declaration in order to support the action.

The special damage must be the natural and proximate consequence of the defamation. Illness of body caused by slanderous words cannot be charged as special damage, because not a consequence which generally happens under the same circumstances. (*Allsop* v. *Allsop*, 29 L. J. Ex. 315.) Damage caused by a third party repeating defamatory words spoken by the defendant cannot be charged as special damage. (*Ward* v. *Weeks*, 7 Bing. 211; *Dixon* v. *Smith*, 5 H. & N. 450; *Bateman* v. *Lyall*, 7 C. B. N. S. 638.) The wrongful acts of third parties cannot be charged as special damage, as where the plaintiff's employer wrongfully dismissed him from his service in consequence of the slander of the defendant. (*Vicars* v. *Wilcocks*, 8 East, 1; and see *Morris* v. *Langdale*, 2 B. & P. 284.) The loss of the hospitality of friends consequent upon slander may be charged as special damage. (*Moore* v. *Meagher*, 1 Taunt. 39.) When a third party acts upon the defamatory words to the prejudice of the plaintiff, although he did not believe them, the consequence may be charged as special damage. (*Knight* v. *Gibbs*, 1 A. & E. 43.)

The special damage must be stated in the declaration with sufficient particularity to inform the defendant of what the plaintiff intends to prove; and the plaintiff is not allowed to give evidence of any special damage which is not sufficiently stated in the declaration. (*See ante*, page 8.) 1 Wms. Saund. 243 *d*, n. (5). Thus, in an action by a tradesman for defamation, charging as special damage that several customers left him, he cannot prove that any particular customer has left him unless the person be named in the declaration (*Browning* v. *Newman*, 1 Strange, 666); so in an action by a woman for defamation, an allegation in the declaration that she thereby lost several suitors is insufficient to admit evidence of any particular suitor having deserted her (*Hartley* v. *Herring*, 8 T. R. 130, 132); so under a declaration alleging special damage by the loss of lodgers, the plaintiff was not allowed to prove the loss of a particular lodger. (*Westwood* v. *Cowne*, 1 Stark, 172.)

It is sufficient however to allege and prove a general decrease of business or custom without having recourse to particular instances. (*Rose* v. *Grooves*, 5 M. & G. 613; *Evans* v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 251.) In an action by the preacher at a chapel for defamation, it was held sufficient to allege generally as special damage, that the persons frequenting the chapel had withdrawn their support, without naming them. (*Hartley* v. *Herring*, 8 T. R. 130; and see *Hopwood* v. *Thorn*, 8 C. B. 293.)

Although the plaintiff fails in proving the special damage alleged (where it is not essential to the cause of action) he may still prove and recover general damages (*Smith* v. *Thomas*, 2 Bing. N. C. 372, 380); and where a tradesman alleged a loss of particular customers which he failed to prove, he was held entitled to prove and recover for a general loss of trade, which he also alleged. (*Evans* v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 251.)

In actions for defamation express malice may be proved in aggravation of damages (per Lord Abinger, C. B., *Chalmers* v. *Payne*, 2 C. M. & R. 156, 157); and for this purpose subsequent libels published by the defendant of the plaintiff are admissible in evidence, and cannot be excluded on the ground that they may disclose distinct causes of action;

Count against a railway company for a libel published by means of a message sent through an electric telegraph: Whitfield v. *South-Eastern Ry. Co.*, 27 L. J. Q. B. 229.

Count by a joint stock company for a libel: Metropolitan Saloon Omnibus Co. v. *Hawkins*, 28 L. J. Ex. 201; 4 H. & N. 87.

Count by co-partners as joint plaintiffs for slander respecting their trade: Maitland v. *Goldney*, 2 East. 426; *Forster* v. *Lawson*, 3 Bing. 452; *Cook* v. *Batchellor*, 3 B. & C. 150.

Count by one of several partners for slander respecting the business: Robinson v. *Marchant*, 7 Q. B. 918.

Count for a Libel in a Foreign Language. (*See ante*, p. 265, n.)

That the defendant falsely and maliciously wrote and published of the plaintiff in the Welsh language, the words following, that is to say, [*here set out the libel verbatim in the Welsh language*] which said words, being translated into the English language, have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say, [*here set out a literal translation of the libel in the English language, and add any innuendo which may be necessary, as in the preceding form*].

Like counts: Zenobio v. *Axtell*, 6 T. R. 162; *Jenkins* v. *Phillips*, 9 C. & P. 766.

Count for a Libel imputing Felony to the Plaintiff.

That the defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say, "He is the person who took my horse;" the defendant meaning thereby that the plaintiff feloniously stole a horse of the defendant.

Count for Slander. (*C. L. P. Act*, 1852, *Sched. B.* 32.)

That the defendant falsely and maliciously spoke and published

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but the jury cannot give damages in respect of them. (*Pearson* v. *Lemaitre*, 5 M. & G. 700; and see *Hemmings* v. *Gasson*, 27 L. J. Q. B. 252.)

The allegation of special damage cannot be expressly pleaded to, except where the special damage is essential to the cause of action (see *ante*, p. 9), and in that case the plea of not guilty puts in issue not only the speaking of the words but also the special damage alleged. (*Wilby* v. *Elston*, 8 C. B. 142.)

The defendant may give evidence in answer to the evidence of special damage adduced by the plaintiff, or in mitigation of the damage proved. He may prove in mitigation of damages that the plaintiff published libels of him, provided they relate to the same matter (*Watts* v. *Fraser*, 7 A. & E. 223; *May* v. *Brown*, 3 B. & C. 113; *Tarpley* v. *Blabey*, 2 Bing. N. C. 437); he may also give evidence of the general bad reputation of the plaintiff at the time of the defamation. (*Richards* v. *Richards*, 2 M. & Rob. 557; and see *Thompson* v. *Nye*, 16 Q. B. 175.) But he cannot give in evidence in mitigation of damages, matter, which if pleaded, would be a defence to the action. (See *ante*, p. 10, n.) Evidence that an apology was offered before the commencement of the action may be given in mitigation of damages, after notice in writing of the defendant's intention to do so, under 6 & 7 Vict. c. 96, s. 1, (see *post*, "*Defamation*," c. 6.)

The county court has no jurisdiction in this action (9 & 10 Vict. c. 95, s. 58); except by consent (19 & 20 Vict. c. 108, s. 23).

of the plaintiff the words following, that is to say, "He is a thief"; [*if there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of, see ante*, p. 266, *for instance*,] whereby the plaintiff lost his situation as gamekeeper in the employ of ——.

Like counts: Hemmings v. *Gasson*, 27 L. J. Q. B. 252; *Barnett* v. *Allen*, 27 L. J. Ex. 412; 3 H. & N. 376; *Reynolds* v. *Harris*, 3 C. B. N. S. 267.

Count for slander spoken in answer to a question: Bromage v. *Prosser*, 4 B. & C. 247; *Galwey* v. *Marshall*, 9 Ex. 294.

Count for Slander of the Plaintiff in his Trade with Statement of Special Damage.

That the plaintiff carried on the business of a ——, and the defendant falsely and maliciously spoke and published of the plaintiff, in relation to his said business and the carrying on and conducting thereof by him, the words following, that is to say [*state the slander verbatim with innuendoes, if necessary*], meaning thereby that the plaintiff cheated and was guilty of fraudulent conduct in his said business [*or as the case may be*]; whereby the plaintiff was injured in his credit and reputation as a —— and in his said business, and *G. H.* and *K. L.* and many other persons who had theretofore dealt with the plaintiff in his said business ceased to deal with him.

Like counts: Evans v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 251; *Reynolds* v. *Harris*, 28 L. J. C. P. 26.

Counts for Libels and Slander imputing Criminal Offences.

For a libel contained in an advertisement in a newspaper, imputing forgery: Stockley v. *Clement*, 4 Bing. 162.

For a libel contained in a report in a newspaper of an examination before a magistrate upon a criminal charge against the plaintiff: Duncan v. *Thwaites*, 3 B. & C. 556; *Delegal* v. *Highley*, 3 Bing. N. C. 950; *Lewis* v. *Levy*, 27 L. J. Q. B. 282.

For imputing perjury to a witness in an account of proceedings under a commission of lunacy: Roberts v. *Brown*, 10 Bing. 519.

For a libel imputing to a gardener that he stole his employer's plants: Gardiner v. *Williams*, 2 C. M. & R. 78; 1 M. & W. 245.

For slander imputing bigamy to a married woman: Heming v. *Power*, 10 M. & W. 564.

For slander imputing that plaintiff had done things for which he ought to be hanged: Francis v. *Roose*, 3 M. & W. 191.

For slander imputing unnatural practices: Thompson v. *Nye*, 16 Q. B. 175.

For a libel calling the plaintiff a "truckmaster": Homer v. *Taunton*, 29 L. J. Ex. 318.

For slander in calling a person a "blackleg," imputing that he cheated at cards: Barnett v. *Allen*, 3 H. & N. 376; 27 L. J. Ex. 412.

Counts for Libel and Slander of Persons in their Offices.

For a libel imputing to a Protestant archbishop that he attempted to convert Catholic priests by offers of money and preferment: Abp. Tuam v. *Robeson* 5 Bing. 17.

For a libel imputing peculation to the mayor of a borough: Godburne v. *Bowman*, 9 Bing. 532.

For a libel contained in a letter to the secretary of state, imputing to the town-clerk of a borough corruption in his office: Blagg v. *Sturt*, 10 Q. B. 899.

For a libel imputing that the plaintiff, as overseer of the poor, had committed perjury in verifying his accounts upon oath: Cannell v. *Curtis*, 2 Bing. N. C. 228.

For slander imputing to a military officer that he incited his force to mutiny: Beatson v. *Skene*, 29 L. J. Ex. 430.

Counts for Libel and Slander of Persons in their Profession, Trade, or Occupation (*a*).

For a libel on an attorney, imputing "sharp practice in his profession," and calling him ironically "an honest lawyer:" Boydell v. *Jones*, 4 M. & W. 446.

For a libel on a proctor, imputing that he had been suspended: Clarkson v. *Lawson*, 6 Bing. 266.

For slander of a medical man, imputing that he was not legally qualified: Collins v. *Carnegie*, 1 A. & E. 695; *imputing professional ignorance and want of skill: Smith* v. *Taylor*, 1 B. & P. N. R. 196.

For a libel on a medical man, imputing conduct contrary to professional etiquette: Ramadge v. *Ryan*, 9 Bing. 333.

For slander of an apothecary, imputing want of care in mixing drugs: Edsall v. *Russell*, 4 M. & G. 1090.

For a libel imputing ignorance and trickery to a vendor of medicines: Morrison v. *Harmer*, 3 Bing. N. C. 759.

For a libel against a bank, imputing that it had stopped payment: Forster v. *Lawson*, 3 Bing. 452. *For a slander imputing the same: Bromage* v. *Prosser*, 4 B. & C. 247.

Slander on one of three copartners of a bank, imputing to him insolvency: Robinson v. *Marchant*, 7 Q. B. 918.

Action by copartners as joint plaintiffs for slander respecting their trade: Cook v. *Batchellor*, 3 B. & C. 150; *Maitland* v. *Goldney*, 2 East, 426; *Forster* v. *Lawson*, 3 Bing. 452.

Count by a joint stock company against one of its shareholders for a libel, imputing insolvency and misconduct: Metropolitan Saloon Omnibus Co. v. *Hawkins*, 28 L. J. Ex. 201; 4 H. & N. 87.

For slander imputing bankruptcy to a tradesman: Brown v. *Smith*, 13 C. B. 596.

For slander of an innkeeper, stating special damage: Evans v. *Harries*, 26 L. J. Ex. 31; 1 H. & N. 251.

For a libel imputing to a publican and licensed victualler, that his house was frequented by thieves and bad characters: Broome v. *Gosden*, 1 C. B. 728.

(*a*) Words imputing general immorality are not a sufficiently specific injury to a person's trade or profession to be included in this class of defamatory matter; such imputations would be actionable in the form of a libel if they came within the description of the next class of cases, but are not actionable as slander, unless followed by special damage. (*Brayne* v. *Cooper*, 5 M. & W. 249; *Ayre* v. *Craven*, 2 A. & E. 2, in the case of a physician; *Galwey* v. *Marshall*, 9 Ex. 294, in the case of a clergyman.)

For slander accusing a pawnbroker of "duffing": Hickinbotham v. *Leach*, 10 M. & W. 361.

For slander in calling a stockbroker a "lame duck": Morris v. *Langdale*, 2 B. & P. 284.

For a libel alleging of a person who kept music and dancing-rooms, that his licence had been refused: Bignell v. *Buzzard*, 27 L. J. Ex. 355; 3 H. & N. 217.

For a libel on a shipowner, imputing that he used an unseaworthy ship for passengers: Ingram v. *Lawson*, 6 Bing. N. C. 212.

For slander of a butcher, imputing that he used false weights: Griffiths v. *Lewis*, 8 Q. B. 841.

For slander of a corn-dealer, imputing that he delivered goods worse than those bargained for: Thomas v. *Jackson*, 3 Bing. 104.

For slander of an asphalte manufacturer, imputing that he used old materials instead of new: Babonneau v. *Farrell*, 15 C. B. 360.

For libel and slander in giving the characters of servants: Pattison v. *Jones*, 8 B. & C. 578; *Prudhomme* v. *Fraser*, 2 A. & E. 645; *Rogers* v. *Clifton*, 3 B. & P. 587.

For a libel in giving the character of a governess: Fountain v. *Boodle*, 3 Q. B. 5.

Counts for Libels imputing Conduct tending to degrade or disparage the Plaintiff, or to hold him up to public Hatred, Contempt, or Ridicule.

For a libel imputing cheating at cards: Digby v. *Thompson*, 4 B. & Ad. 821.

For a libel imputing cheating at a horse-race, by fraudulently withdrawing a horse: Greville v. *Chapman*, 5 Q. B. 731.

For a libel imputing that the plaintiff had insulted females: Clement v. *Chivis*, 9 B. & C. 172.

For a libel imputing that the plaintiff had been mistaken for Jack Ketch: Cook v. *Ward*, 6 Bing. 409.

For a libel in calling the plaintiff a "black sheep": M'Gregor v. *Gregory*, 11 M. & W. 287; *O'Brien* v. *Clement*, 16 M. & W. 159.

Counts for Slander in respect of Words not actionable in themselves, but only in respect of the Special Damage caused thereby (*a*).

For slander of the minister of a Dissenting congregation, imputing incontinence, in consequence of which some of his congregation withdrew: Hartley v. Herring, 8 T. R. 130; *and see Ayre* v. *Craven*, 2 A. & E. 2; *Hopwood* v. *Thorn*, 8 C. B. 293.

For slander, imputing incontinence to the plaintiff, whereby she lost the society and hospitality of her friends: Moore v. *Meagher*, 1 Taunt. 39; *Wilby* v. *Elston*, 8 C. B. 142.

For a similar imputation on a physician: Ayre v. *Craven*, 2 A. & E. 2. *On a clergyman: Galwey* v. *Marshall*, 9 Ex. 294.

For slander of a woman in her trade of a boarding-house keeper, whereby she incurred loss in her business. [*A wife cannot join with her husband as a plaintiff in this action, and he can sue only in re-*

(*a*) The matter on which actions of this class are grounded, must be of a defamatory nature; if not, it is not actionable though followed by special damage. (*Kelly* v. *Partington*, 5 B. & Ad. 645.)

spect of the loss of business consequent upon the slander as special damage.] *Saville* v. *Sweeny*, 4 B. & Ad. 514.

* *Counts for Slander of Title*, see *post*, *p.* 348.

Detention of Goods, or Detinue (*a*).

Count for the wrongful Detention of Goods (Detinue).
(C. L. P. Act, 1852, Sched. B. 29.)

That the defendant detained from the plaintiff his title-deeds of

(*a*) *Detention of goods.*]—An action lies for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for the damages occasioned by the wrongful detainer. (3 Bl. Com. 151.) The form of action adapted for suing for the wrongful detention of property is called *detinue*. The declaration in detinue formerly commenced with a statement either that the plaintiff had lost the goods and they had come to the possession of the defendant by finding, or that the plaintiff had delivered the goods to the defendant to be re-delivered to him on request; and the count was spoken of as *detinue sur trover* or *detinue sur bailment*, according to the form adopted; but these allegations, which were generally fictitious, were immaterial, and were not traversable (*Gledstane* v. *Hewitt*, 1 C. & J. 565); and now by the C. L. P. Act, 1862, s. 49, they must be omitted.

In some respects this form of action resembles actions arising *ex contractu*. Even before the C. L. P. Act, 1852, permitted various forms of action to be joined, it might have been joined with debt; and although the defendant's possession of the goods arise out of a contract of bailment, this form of action lies for a wrongful detention of them. (*See Walker* v. *Needham*, 3 M. & G. 557, 561.) But as the gist of the action is the wrongful detention of goods, it is, in substance, an action for a wrong independent of contract. (*Gledstane* v. *Hewitt*, 1 C. & J. 565; *Broadbent* v. *Ledward*, 11 A. & E. 209; *Clements* v. *Flight*, 16 M. & W. 42.) The bailment, if laid in the declaration, is immaterial and not traversable. (*Whitehead* v. *Harrison*, 6 Q. B. 423; *Reeve* v. *Palmer*, 5 C. B. N. S. 84, 93.) An action for the recovery of chattels detained is an action to try a right besides the mere right to recover damages, and therefore is not within the C. L. P Act, 1860 (23 & 24 Vict. c. 126), s. 34, which enables a judge in any action for an alleged wrong to certify to the contrary, in order to deprive the plaintiff of costs upon recovery by verdict of less than £5. (*Danby* v. *Lamb*, 31 L. J. C. P. 17.) Such an action is held to be a demand within the 3 & 4 Will. IV. c. 42, s. 17, and may be tried before the sheriff under that statute.

To support this action, the plaintiff must have the right to the immediate possession of the goods at the time of commencing the action, arising out of an absolute or a special property; an interest in reversion is not sufficient. (See *ante*, "*Conversion*," p. 253, and *post*, "*Trespass to goods.*")

In this action the goods must be sufficiently ascertained and distinguishable to be capable of being recovered. Thus the action cannot be brought for a sum of money or a quantity of corn, unless they be specifically distinguished from other property of the same kind, as by being in a bag or a sack. (3 Bl. Com. 152.) This action may be brought for the title-deeds of a real estate; and the proper party to sue in such case is the person entitled to the legal interest in the estate. (*Atkinson* v. *Baker*,

land called Belmont, in the county of ——, that is to say [*describe the deeds, and conclude as in the form, ante, p.* 8].

Like counts for the detention of title-deeds: Newton v. *Beck*, 27

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4 T. R. 229; *Philips* v. *Robinson*, 4 Bing. 111; *Plant* v. *Cotterill*, 5 H. & N. 430; 29 L. J. Ex. 198.)

The injurious act being the wrongful detention of the goods, and not the original taking or obtaining of the possession, it is immaterial whether they were obtained by the defendant by lawful means, as by a bailment or finding, or by a wrongful act, as by a trespass or conversion. (1 Chit. Pl. 7th ed. 137.) The usual evidence of the detention is, that the defendant, having the possession or control over the goods, does not deliver them to the plaintiff when demanded. The defendant cannot excuse himself from such delivery by reason of his having lost the possession by his own wrongful act, as where the defendant, having had the possession of the plaintiff's goods, has wrongfully sold them (*Jones* v. *Dowle*, 9 M. & W. 19); or carelessly lost them. (*Reeve* v. *Palmer*, 27 L. J. C. P. 327; 28 L. J. C. P. 168; 5 C. B. N. S. 84.)

The goods must be described in the declaration with sufficient certainty and accuracy for the purpose of identification, because the judgment and execution are for the recovery of the specific goods. (2 Wms. Saund. 74 *b*.)

The judgment for the plaintiff in this action is, that he recover against the defendant the goods, or the sum assessed by the jury for the value of them, if the plaintiff cannot have his goods again, and also his damages and costs assessed by the jury beyond the value of the goods, and also the costs of increase. (Chit. Forms. 9th ed. 255.) Before the C. L. P. Act, 1854, the defendant, under the judgment in this action, had the option to deliver the goods, or to retain them and pay the value assessed by the jury. (*Phillips* v. *Jones*, 15 Q. B. 859.) By sect. 78 of that Act "the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that if the said chattel cannot be found, and unless the court or judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant renders such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action." This section does not apply where the jury have not assessed the value. (*Chilton* v. *Carrington*, 15 C. B. 730.)

Under the C. L. P. Act, 1852, payment into court could not be made in this action in respect of the plaintiff's claim for a return of the goods. (*Allan* v. *Dunn*, 26 L. J. Ex. 185; 1 H. & N. 572.) But such payment might (and still may) be made and pleaded in respect of the plaintiff's claim for damages for the detention of the goods, as distinct from the claim for their return. (*Crossfield* v. *Such*, 8 Ex. 159.) And now by the C. L. P. Act, 1860, s. 25, the defendant may, by leave of the court or a judge, pay into court a sum of money to the value of the goods alleged to be detained. (See *post*, c. 6, "*Payment into Court.*")

If there are distinct goods or parcels of goods claimed in the declaration, the jury should assess the value of each separately. (*Sandford* v. *Alcock*, 10 M. & W. 689.) Where the goods have been redelivered, the jury may

L. J. Ex. 272; 3 H. & N. 220; *Foster* v. *Crabb*, 12 C. B. 136, 379; *Plant* v. *Cotterell*, 29 L. J. Ex. 198; 5 H. & N. 430.

For the detention of books and papers: Atwood v. *Ernest*, 13 C. B. 881.

For the detention of letters: Oliver v. *Oliver*, 31 L. J. C. P. 4; 11 C. B. N. S. 139.

For the detention of railway debentures and coupons: Barton v. *Gainer*, 27 L. J. Ex. 390; 3 H. & N. 387.

For the detention of railway scrip, stating special damage: Williams v. *Archer*, 5 C. B. 318.

For the detention of a ship's register, stating special damage (under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 50): Wiley v. *Crawford*, 29 L. J. Q. B. 244; 30 L. J. Q. B. 319; 1 E. B. & S. 253.

Count for the Detention of a Lease, whereby the Plaintiff was prevented from selling the demised Premises.

That the defendant detained from the plaintiff a deed of the plaintiff, that is to say, a lease dated the —— day of ——, A.D. ——, made between *G. H.* of the one part and the plaintiff of the other part, whereby the said *G. H.* demised to the plaintiff a house and premises at ——, for an unexpired term of years; whereby the plaintiff was prevented from selling the said lease and his term and interest in the said house and premises to *J. K.*, and lost the price he would have received for the same, and incurred expense in keeping, maintaining, and repairing the said house. [*Conclude as ante*, *p.* 8.]

A like count: Chilton v. *Carrington*, 16 C. B. 106.

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confine their assessment to the damages for the detention. (*Williams* v *Archer*, 5 C. B. 318; *Crossfield* v. *Such*, 8 Ex. 159.) Special damage may be recovered if properly laid in the declaration (*Ib.*). Where the goods have been redelivered after the commencement of the action, the defendant should plead the redelivery in bar to the further maintenance, upon which the plaintiff may confess such plea and obtain his costs up to that time, otherwise the plaintiff will obtain a verdict and the costs of proceeding to trial. (*Leader* v. *Rhys*, 30 L. J. C. P. 345; 10 C. B. N. S. 369.)

In this action the court will sometimes exercise a summary jurisdiction to stay proceedings upon delivery up of the deeds or goods sought to be recovered, and upon payment of nominal damages and costs, and upon such other terms as the court thinks proper to impose. (2 Chit. Pr. 11th ed. p. 1367.)

The county courts have jurisdiction in actions of detinue where the value of the goods does not exceed £50. (*Taylor* v. *Addyman*, 13 C. B. 309.) The right to costs in actions in the superior courts also depends on the value of the goods sued for. (*Leader* v. *Rhys*, *supra.*)

Metropolitan police magistrates have a summary jurisdiction to order the delivery up of goods detained and to adjudicate upon liens upon them, where the value of the goods is not greater than £15. (2 & 3 Vict. c. 71, s. 40.)

Dilapidations (*a*).

Count by a Rector against his Predecessor, who resigned, for Dilapidations.

(*Venue local.*) That the defendant was rector of the parish of ——, and as such rector before and at the time of his resignation hereinafter mentioned was in right of his said rectory seized in fee of the chancel of the parish church of the said parish, and of certain houses, buildings, lands, and fences, and being so seized resigned the said rectory to the bishop of the diocese to which the said rectory belonged, who accepted the said resignation, having competent authority to accept the same, whereby the said rectory became vacant; and the plaintiff was afterwards in due form of law presented, admitted, instituted, and inducted to the same rectory, and thereby became rector of the same parish church, and became and still continues seized in right thereof of the said chancel of the said parish church, and of the said houses, buildings, lands, and fences, and was and is the next successor of the defendant to the same rectory and premises; and at the time of the said resignation of the defendant the said chancel, houses, buildings, and fences were and still remain dilapidated and out of repair, and were so left by the defendant when the said rectory became vacant as aforesaid, and the sum necessary to be expended for the necessary repairing of the said chancel, houses, buildings, and fences amounted to £——, of all which the defendant after the plaintiff was so presented, admitted, instituted, and inducted as aforesaid had notice, and was then requested by the plaintiff to pay for such necessary repairs as aforesaid; and a reasonable time for the defendant to pay for the same elapsed, and all things necessary happened to entitle the plaintiff to be paid the said £——, and to maintain this action; yet the defendant has not paid the same.

Like counts: Goldham v. *Edwards*, 16 C. B. 437; 17 C. B. 141; 25 L. J. C. P. 223; *Downes* v. *Craig*, 9 M. & W. 166.

Count by the rector or vicar against the executor of a deceased rector for dilapidations: Bird v. *Relph*, 2 A. & E. 773; *Bryan* v. *Clay*, 1 E. & B. 38.

Count by the executor of a deceased incumbent against the executor of the predecessor, to recover the amount of dilapidations, which the plaintiff had been compelled to pay to the present incumbent: Bunbury v. *Hewson*, 3 Ex. 558.

(*a*) The incumbent of a benefice is bound to keep the buildings belonging to his benefice in good and substantial repair, according to their original form, without alteration, and also to restore and rebuild them when necessary; he is not bound to maintain or supply matters of ornament or luxury. (*Wise* v. *Metcalfe*, 10 B. & C. 299.) In case of default an action lies at common law by the custom of England at the suit of his successor to recover the value of the dilapidations. The Custom was extended to Wales by the 27 Hen. VIII. c. 26. (*Bunbury* v. *Hewson, supra.*)

In the case *Goldham* v. *Edwards, supra*, the plea that the plaintiff and defendant agreed to exchange their livings in their then state and condition was held good, as not necessarily showing a simoniacal contract. And see *Downes* v. *Craig, supra.*

Count against a perpetual curate by his successor for dilapidations: Mason v. *Lambert,* 12 Q. B. 795.

Count by a vicar choral of Wells Cathedral against the executrix of a deceased vicar choral for dilapidations of the vicar's house: Gleaves v. *Purfitt,* 29 L. J. C. P. 216; 7 C. B. N. S. 838.

Distress (*a*).

Count for Distraining and Selling where no Rent was due, for double Value of the Goods sold, under 2 *W. & M. sess.* 1, *c.* 5, *s.* 5 (*b*).

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant wrongfully distrained in the said messuage divers goods of the plaintiff as a distress for pretended arrears of the said rent, and wrongfully sold the said goods as such distress, whereas at the time of the making of the said distress and of the said sale as aforesaid no rent was due or in arrear for or in respect of the said messuage, contrary to the statute in such case made and provided.

A like count: Hoare v. *Lee,* 5 C. B. 754. [*Where the court would not allow a count in trespass to be joined.*]

(*a*) In actions for *illegal* distresses, as a distress where no rent is due, or after tender of the rent due, or a distress of things privileged from distress, the declaration may be framed specially upon the particular grievance committed, or it may be framed generally in trespass or trover for the injury committed to the plaintiff's land or goods. (See *post,* pp. 276, 277.) For the taking of the goods the plaintiff may proceed by replevin. (See *post,* Replevin.)

An action for an *excessive* distress lies under the Statute of Marlbridge, and the plaintiff cannot maintain trespass or trover. (See *post,* p. 278.)

Actions for *irregular* distresses lie only in respect of the special damage occasioned by irregularities in conducting distresses; and the declaration must be framed upon the particular description of irregularity complained of. (See *post,* p. 279.)

The Metropolitan Police Magistrates have a summary jurisdiction in cases of unlawful, irregular, and excessive distresses, where the tenancy is by the week or month or the rent does not exceed £15 a year, to order a return of the distress on payment of the rent, or, if it has been sold, a payment of the value, deducting the rent. (2 & 3 Vict. c. 71, s. 39.)

(*b*) The statute 2 W. & M. sess. 1, c. 5, for enabling the sale of goods distrained for rent, by s. 5, enacts, "that in case any such distress and sale as aforesaid shall be made by virtue or colour of this present Act for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit." Upon the trial of an action brought upon this section the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods. (*Master* v. *Farris,* 1 C. B. 715.)

For Distraining twice for the same Rent (*a*).

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and at the time of making the said distress there were in the said messuage goods of the plaintiff liable to the said distress of more than sufficient value to have satisfied the said arrears and the charges of a distress for the same, and of the appraisement and sale thereof, and which the defendant could then have distrained to satisfy the same, of which the defendant then had notice; yet the defendant afterwards wrongfully made a second distress on certain goods of the plaintiff in the said messuage for the same arrears of rent for which the first-mentioned distress was so made as aforesaid, and for the charges of such second distress.

A like count: *Lear* v. *Caldecott*, 4 Q. B. 123.

Count for a second distress for the same rent after abandoning the first: *Smith* v. *Goodwin*, 4 B. & Ad. 413.

Count for a second distress after seizing and retaining growing crops which were sufficient in value: *Piggott* v. *Birtles*, 1 M. & W. 441.

For Distraining Beasts of the Plough, under 51 *Hen. III. st.* 4 (*b*).

That the plaintiff was tenant to the defendant of land at a certain

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(*a*) In this case a special count appears to be unnecessary, as an action of trespass or trover will lie for the wrongful taking or conversion of the goods under the second distress. (*Dawson* v. *Cropp*, 1 C. B. 961; and see *Bagge*, v. *Mawby*, 8 Ex. 641.)

(*b*) The statute 51 H. III. st. 4, enacts that no man shall be distrained by his beasts that gain his land nor by his sheep, so long as the distrainer can find other chattels sufficient for the demand. (2 Inst. 132.) As to what are beasts that gain the land, see *Keen* v. *Priest*, 4 H. & N. 236. The statute applies equally whether there is an immediate tenancy between the occupier and the distrainer, or whether there is a subtenancy. (*Ib.*) The measure of damages is the full value of the goods taken, without any reduction for the rent due. (*Ib.*) The plaintiff may also in this case bring trespass or trover, or replevy the goods unlawfully taken. (*Naryatt* v. *Nias*, 28 L. J. Q. B. 143; El. & El. 439; *Davies* v. *Aston*, 1 C. B. 746.) Similar to this action is that for distraining implements of trade and other things privileged from distress, whether absolutely or conditionally. (*Ib.*; *Harvey* v. *Pocock*, 11 M. & W. 740.)

Fixtures are absolutely privileged from distress, and trover will lie by the tenant for fixtures removed under a distress. (*Dalton* v. *Whittern*, 3 Q. B. 961.) A distrainer is not liable for claiming to take fixtures unless he actually removes them. (*Beck* v. *Denbigh*, 29 L. J. C. P. 273.) As to what things are privileged as fixtures, see *Duck* v. *Braddyll*, 13 Price, 455; *Hellawell* v. *Eastwood*, 6 Ex. 295. Growing crops, which could not be distrained at common law, are distrainable by statute 11 Geo. II. c. 19, s. 8.

Implements of trade are privileged from distress for rent conditionally, that is to say, if other sufficient distress can be found. (*Gorton* v. *Falkner*, 4 T. R. 565.)

Commodities of a perishable nature and which cannot be restored in the same state as that in which they were taken, as meat, milk, fruit, etc., cannot

rent payable by the plaintiff to the defendant; and the defendant, for certain arrears of the said rent, distrained upon the said land the beasts of the plough of the plaintiff wherewith the plaintiff tilled the said land, although there were then upon the said land other goods of the plaintiff, not being beasts of the plough or sheep, liable to the said distress and sufficient to satisfy the said arrears and the charges of a distress for the same, and of the appraisement and sale thereof, and which the defendant might then have distrained for the said arrears and charges, whereof the defendant then had notice, contrary to the statute in such case made and provided.

Like count: Piggott v. *Birtles*, 1 M. & W. 441.

Count for distraining the plaintiff's sheep: Keen v. *Priest*, 28 L. J. Ex. 157.

For Refusing to restore Goods distrained on Tender of the Rent and charges before the Impounding (*a*).

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards, whilst the defendant was in possession of the said goods under such distress and before the same were impounded, the plaintiff tendered

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be distrained, and formerly corn and hay were thus privileged, but they have been made distrainable by 2 W. & M. c. 5, s. 3. (*Morley* v. *Pincombe*, 2 Ex. 101.)

Goods necessarily delivered to a person exercising a trade for the purpose of having them dealt with in the way of his trade are absolutely privileged. (*Wood* v. *Clarke*, 1 C. & J. 484; *Brown* v. *Shevill*, 2 A. & E. 138; *Muspratt* v. *Gregory*, 1 M. & W. 633, 657; *Findon* v. *M'Laren*, 6 Q. B. 891; and see *Joule* v. *Jackson*, 7 M. & W. 450; *Parsons* v. *Gingell*, 4 C. B. 545.)

Things in actual use of a person are privileged whilst they are being used, as a horse on which a person is riding (*Storey* v. *Robinson*, 6 T. R. 138); a loom with which a person is weaving. (*Simpson* v. *Hartopp*, Willes, 512; 1 Smith's L. C., 5th ed. 368.)

See further as to what things are privileged from distress, Co. Lit. 47 *a*, *b*; notes to *Simpson* v. *Hartopp*, *supra*; Bullen on Distress, pp. 89–104.

(*a*) Tender before the distress makes the distress wrongful; tender after the distress and before impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the taking nor the detainer wrongful, for then it comes too late. (Per Lord Coke in *Six Carpenters' case*, 8 Co. Rep. 147 *a*; cited by Tindal, C. J., in *Gulliver* v. *Cosens*, 1 C. B. 788, 795; *West* v. *Nibbs*, 4 C. B. 172.) Tender may be made at any time before the impounding is complete (see *Thomas* v. *Harries*, 1 M. & G. 695), which may be without removal of the goods (*Ib.*), as by mere agreement with the party distrained upon to consider the goods as impounded. (*Washborn* v. *Black*, 11 East, 405; *Tennant* v. *Field*, 8 E. & B. 336.) Tender may be made to a bailiff authorized to make a distress, but not to a man put in by the bailiff to keep possession. (*Boulton* v. *Reynolds*, 29 L. J. Q. B. 11.) Tender before actual distress need not include the costs incurred, although the warrant to distrain has been delivered for execution. (*Bennett* v. *Bayes*, 29 L. J. Ex. 224; 5 H. & N. 391.)

Trespass, detinue, trover, or replevin will lie for a wrongful distress made after tender. (See *Branscombe* v. *Bridges*, 1 B. & C. 145; *Holland* v. *Bird*, 10 Bing. 15.) Detinue or replevin will lie for a wrongful detainer after

to the defendant in satisfaction and discharge of the said arrears and of the charges of the said distress a sum of money equal to the said arrears and charges and sufficient to satisfy and discharge the same, and requested the defendant to redeliver the said goods to the plaintiff; yet the defendant did not nor would accept the said sum so tendered as aforesaid, or redeliver the said goods to the plaintiff, and afterwards wrongfully impounded the said goods.

A like count: Loring v. *Warburton*, 21 L. J. Q. B. 31; *Boulton* v. *Reynolds*, 29 L. J. Q. B. 11.

Count for selling the goods notwithstanding a tender made after the impounding, see post, p. 281.

Count for selling after replevin granted: Mounsey v. *Dawson*, 6 A. & E. 752.

Count for taking an excessive Distress, under the Statute of Marlbridge, 52 Hen. III. c. 4 (a).

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the de-

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tender made before impounding. (*Gulliver* v. *Cosens*, 1 C. B. 788; *Evans* v. *Elliott*, 5 A. & E. 142.) And trespass or trover also if the goods have been afterwards removed by the distrainer. (*Vertue* v. *Beasley*, 1 M. & Rob. 21.) Trover or detinue will lie, if the landlord refuses to deliver the goods after tender and acceptance of the rent in arrear and the expenses of the distress after impounding. (*West* v. *Nibbs*, 4 C. B. 172.)

An action may be maintained for selling after a tender of the rent made within the five days allowed by the statute 2 W. & M. sess. 1, c. 5, s. 2, although the tender is made after impounding. See *post*, p. 281.

(*a*) *Excessive Distress.*]—This action lies upon the Statute of Marlbridge, 52 Hen. III. c. 4, which enacts that "distresses shall be reasonable, and not too great." (See 2 Inst. 107.) If any rent be due, no action will lie for a distress merely because it is made under a claim of more than is due, unless it be followed by some special damage. (*Tancred* v. *Leyland*, 16 Q. B. 664; *Lucas* v. *Tarleton*, 27 L. J. Ex. 246; 3 H. & N. 116; *Stevenson* v. *Newnham*, 13 C. B. 285; *Glynn* v. *Thomas*, 25 L. J. Ex. 125; 11 Ex. 870; *French* v. *Phillips*, 26 L. J. Ex. 82; 1 H. & N. 564.) But if more goods are taken than are sufficient to cover the arrears of rent and expenses, an action will lie for an excessive distress: see form above. In this case, trespass or trover will not lie. (*Lynn* v. *Moody*, 2 Str. 851; *Hutchins* v. *Chambers*, 1 Burr. 590; *Whitworth* v. *Smith*, 5 C. & P. 250.)

If a larger sum than is due for arrears is paid under a distress, the excess cannot be recovered back in an action for money received. (*Knibbs* v. *Hall*, 1 Esp. 84; *Glynn* v. *Thomas*, 25 L. J. Ex. 125; 11 Ex. 870; and see *ante*, p. 41.)

The mere distraining of the goods to an excessive value above the rent due, without sale or removal, is sufficient to support this action. (*Sells* v. *Hoare*, 1 Bing. 401; *Swann* v. *Earl of Falmouth*, 8 B. & C. 456; and see *Bayliss* v. *Fisher*, 7 Bing. 153.) The action lies for the excessive taking of things distrainable by statute, as growing crops, as well as things distrainable at common law. (*Piggott* v. *Birtles*, 1 M. & W. 441, 449.) The excess of the value of the goods distrained above the arrears of rent due must be unreasonably great. The landlord is not bound to calculate very nicely the value of property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. (Per Bailey, J., *Willoughby* v. *Backhouse*, 2 B. & C. 821, 823; *Roden* v.

fendant wrongfully distrained for certain arrears of the said rent goods of the plaintiff of much greater value than the amount of the said arrears and of the charges of the said distress and of the appraisement and sale thereof, although part of the said goods was then of sufficient value to have satisfied the said arrears and charges, and might then have been distrained by the defendant for the same, and the defendant thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute in such case made and provided.

Like counts by the owner of the goods distrained for rent due from a third person: Lucas v. *Tarleton*, 27 L. J. Ex. 246; 3 H. & N. 116.

Action for taking an excessive distress where some of the goods belonged to a third party: Bail v. *Mellor*, 19 L. J. Ex. 279.

Count for Selling without Five Days' Notice of the Distress, under 2 W. & M. sess. 1, *c.* 5, *s.* 2 (*a*).

That the plaintiff was tenant to the defendant of a messuage at a

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Eyton, 6 C. B. 427.) The landlord is not bound by the amount of rent claimed at the time of distraining; but the plaintiff must show an excess above the amount really due. (See *Tancred* v. *Leyland*, 16 Q. B. 669; *Phillips* v. *Whitsed*, 29 L. J. Q. B. 164.)

The test of value of the goods seized is what they would have sold for at a broker's sale. (*Wells* v. *Moody*, 7 C. & P. 59.) An actual sale made under the distress, though not proved to be unfair, is not a conclusive test of value; and an action may be maintained for an excessive distress, if the excess be proved, though the sale of the goods did not in fact realize the rent due. (*Smith* v. *Ashforth*, 29 L. J. Ex. 259.) Where the goods have been appraised by sworn brokers under the statute 2 W. & M. c. 5, s. 2 (*infra*), the amount of the appraisement is *primâ facie* evidence of their value. (*Walter* v. *Rumbal*, 1 L. Raym. 53.)

The measure of damages in this action, if the goods are removed and impounded off the land, is the loss of the use and enjoyment of the surplus of the goods, and if the goods are not restored before action, the plaintiff may claim the full value of the surplus. (*Piggott* v. *Birtles*, 1 M. & W. 441, 448.) The plaintiff may recover substantial damages, although the goods are not removed or sold, and the plaintiff retains the use of them while under the distress. (*Bayliss* v. *Fisher*, 7 Bing. 153.) Upon an excessive distress of growing crops, the measure of damages was held to be the compensation for the additional expense of the distress, and for the loss of ownership and power of disposition, or, if the tenant replevied, for the additional expense and inconvenience of replevying to a larger amount. (*Piggott* v. *Birtles*, 1 M. & W. 441.)

Damages for a sale of the goods for less than their value cannot be claimed under this count, unless this cause of complaint is specifically alleged. (*Thompson* v. *Wood*, 4 Q. B. 493.)

(*a*) *Irregular distresses.*]—By the common law goods distrained for rent could not be sold, but could only be detained as a pledge for enforcing payment of the rent. A power of selling the goods was given by the statute 2 W. & M. sess. 1, c. 5, subject to certain restrictions and formalities which must be strictly complied with. By the 2nd section of the above statute it was enacted "that where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days after

certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards sold the said goods towards satisfaction of the said arrears and of the charges of such distress and of the appraisement and sale of the said goods, without notice of the said distress and of the cause of taking the same having been given to the plaintiff or left at the said messuage, being the premises charged with the said rent, five days before the sale of the said goods, contrary to the statute in such case made and provided; whereby [*here state the special damage*].

For Selling the Distress without Appraisement under 2 *W. & M. sess.* 1, *c.* 5, *s.* 2.

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards sold the said goods towards satisfaction of the said arrears and of the

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such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion, house, or other most notorious place on the premises, charged with the rent distrained for, replevy the same, then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are hereby empowered to swear), to appraise the same truly, according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use." Various causes of action frequently arise from irregularities committed by persons availing themselves of the provisions of this statute, for which forms are given above.

At common law an irregularity in the conduct or treatment of a distress made the party distraining a trespasser *ab initio*, and liable to be sued as such. (*Six Carpenters' case*, 8 Co. 146, *a*; 1 Smith's L. C. 5th ed. 128.) This doctrine occasioned great hardship in cases of distress for rent, particularly after the above statute of W. & M. had allowed the sale of the distress subject to the formalities mentioned above; and consequently the rule was altered in these cases by the 11 Geo. II. c. 19, s. 19, which enacted that "where any distress should be made for any kind of rent justly due, and any irregularity or unlawful act should be afterwards done by the party distraining or his agent, the distress itself shall not be deemed to be unlawful nor the party making it be therefore deemed a trespasser *ab initio*; but the party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damages sustained thereby and no more." In respect of distresses other than for rent, the common law doctrine still prevails.

An action for any irregularity in dealing with a distress cannot be maintained without proof of special damage, on failure of which the plaintiff is not entitled to a verdict for even nominal damages, but the defendant is entitled to the verdict. (*Proudlove* v. *Twemlow*, 1 C. & M. 326; *Rogers* v. *Parker*, 25 L. J. C. P. 220; 18 C. B. 112; *Lucas* v. *Tarleton*, 27 L. J. Ex. 246; 3 H. & N. 116.) And since the last two cases it would seem advisable

charges of such distress and of the sale of the said goods without causing the same to be appraised by two sworn appraisers, contrary to the statute in such case made and provided; whereby [*here state the special damage*].

For not Selling for the best Price under 2 *W. & M. sess.* 1, *c.* 5, *s.* 2.

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards sold the said goods towards satisfaction of the said arrears and of the charges of such distress, and of the appraisement and sale of the said goods, and did not so sell the same for the best price that could be gotten for the said goods, contrary to the statute in such case made and provided; whereby [*here state the special damage*].

Count for Selling the Goods after a Tender of the Rent, etc., within the five Days (*a*).

That the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards and before the expiration of five days from the said distraining of the said goods the plaintiff tendered to the defendant in satisfaction and discharge of the said arrears of rent and of the charges of the said distress a sum equal in amount to the said arrears and charges, and sufficient to satisfy and discharge the same, and requested the defendant not to sell the said goods; yet the defendant did not nor would accept the said sum so tendered as aforesaid, and afterwards wrongfully sold the said goods, contrary to the statute in such case made and provided.

A like count: Johnson v. *Upham*, 28 L. J. Q. B. 252.

For not Leaving in the hands of the Sheriff, etc., the Overplus, after Sale of the Distress, under 2 *W. & M. sess.* 1, *c.* 5, *s.* 2 (*b*).

That the plaintiff was tenant to the defendant of a messuage at a

to allege special damage in the declaration. The landlord is liable for the irregularities committed by his broker in conducting the distress; but he is not, in general, liable for acts wholly unlawful committed by the broker, as where the latter distrains on the wrong premises, or on goods privileged from distress, as fixtures, unless he expressly sanctioned them by prior authority or subsequent assent after notice. (*Lewis* v. *Reed*, 13 M. & W. 834; *Gauntlett* v. *King*, 3 C. B. N. S. 59; *Haseler* v. *Lemoyne*, 28 L. J. C. P. 103; 5 C. B. N. 130.) The person who authorizes the broker is liable, although he is only an agent of the landlord. (*Bennett* v. *Bayes*, 29 L. J. Ex. 224.)

(*a*) By the common law, a tender must be made before impounding, otherwise it is too late. (See *ante*, p. 277, n.) But upon the equity of the statute of 2 W. & M. sess. 1, c. 5, s. 2 (*ante*, p. 279, n.), an action is maintainable if goods distrained for rent are sold after a tender made within the five days, though the tender be made after the impounding. (*Johnson* v. *Upham*, 28 L. J. Q. B. 252, overruling *Ellis* v. *Taylor*, 8 M. & W. 415.)

(*b*) The count founded upon the statute is the proper remedy; an action

certain rent payable by the plaintiff to the defendant; and the defendant distrained divers goods of the plaintiff in the said messuage as a distress for certain arrears of the said rent, and afterwards sold the said goods towards satisfaction of the said arrears and the charges of the said distress, and of the appraisement and sale of the said goods for a larger sum of money than was sufficient to satisfy and discharge the said arrears and charges, and the defendant received the said sum and satisfied thereout the said arrears and charges; yet the defendant did not leave the overplus thereof in the hands of the sheriff or under-sheriff of the county, or of the constable of the hundred, parish, or place where the said distress was taken for the use of the plaintiff, being the owner of the said goods as aforesaid, although a reasonable time for that purpose elapsed, contrary to the statute in such case made and provided; whereby [*here state the special damage*].

Count for excessive charges for impounding, under 1 *&* 2 *P. & M. c.* 12, *s.* 2: *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

Against a Bailiff for Extorting excessive Charges for a Distress (*a*).

The reasonableness of the charges made for conducting a distress may be disputed, and any excess recovered under the preceding count for not leaving the overplus after the sale of the distress in the hands of the sheriff. (*Lyon* v. *Tomkies*, 1 M. & W. 603.) Where the goods have been redeemed and excessive charges have been paid to the broker in order to redeem them, the excess may be recovered back from him under a count for money received to the plaintiff's use. (*Hills* v. *Street*, 5 Bing. 57.)

Count against the broker or person distraining for not giving the tenant a copy of the charges of the distress, under 57 *Geo. III. c.* 93, *s.* 6; *Hart* v. *Leech*, 1 M. & W. 560.

For irregularities in conducting a distress of growing crops, under 11 *Geo. II. c.* 19, *s.* 8: *Owen* v. *Legh*, 3 B. & Ald. 470; *Proudlove* v. *Twemlow*, 1 C. & M. 326; *Piggott* v. *Birtles*, 1 M. & W. 441; *Rogers* v. *Parker*, 25 L. J. C. P. 220; 18 C. B. 112.

Count for pound-breach and rescue of a distress (*b*): *Parrett Navigation Co.* v. *Stower*, 6 M. & W. 564; *Smith* v. *Wright*, 30 L. J. Ex. 313; 6 H. & N. 821.

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of trover or for money received is not maintainable. (*Eastwood* v. *Yates*, 6 Ex. 805; *Evans* v. *Wright*, 27 L. J. Ex. 50; 2 H. & N. 527.)

(*a*) Where the rent distrained for does not exceed £20, the charges are limited by 57 Geo. III. c. 93; where the rent exceeds that sum the charges must be reasonable. (*Lyon* v. *Tomkies*, 1 M. & W. 603.)

(*b*) The plaintiff in this action is entitled to treble damages under 2 W. & M. sess. 1, c. 5, s. 4. The person guilty of pound-breach and rescue may be proceeded against summarily before justices, under the 6 & 7 Vict. c. 30, s. 1.

Count for abusing a distress by impounding it in an improper place (*a*) : *Wilder* v. *Speer*, 8 A. & E. 547 ; *Bignell* v. *Clark*, 29 L. J. Ex. 257 ; 5 H. & N. 485.

Easements.

See "*Common*," *ante*, p. 249 ; "*Light*," *post*, p. 301 ; "*Support*," *post*, p. 350 ; "*Watercourses*," *post*, p. 366 ; "*Ways*," *post*, p. 369.

Election.

Counts against the returning officer at an election of a member of Parliament for refusing to receive the plaintiff's vote : Ashby v. *White*, 2 L. Raym. 938 ; 1 Smith's L. C. 5th ed. 216 ; *Pryce* v. *Belcher*, 3 C. B. 58 ; 4 D. & L. 238.

Count against churchwardens for refusing to receive the plaintiff's vote at an election of vestrymen, under the Metropolitan Local Management Act : Tozer v. *Child*, 25 L. J. Q. B. 337 ; 6 E. & B. 289 ; 7 E. & B. 377.

Counts for penalties for bribery, etc., at elections, ante, "*Penal Statutes*," p. 202.

Executors (*b*).

Counts by and against executors and administrators for conversion of goods, see ante, "*Conversion*," p. 253.

Counts against the executors of a deceased rector for dilapidations, see ante, "*Dilapidations*," p. 274.

(*a*) Where the distrainer abuses a distress, as by working it, it is considered as no longer impounded or in the custody of the law, and the owner may interfere to prevent the working of the distress without being guilty of a pound-breach or rescue. (*Smith* v. *Wright*, 30 L. J. Ex. 313 ; 6 H. & N. 821.)

(*b*) *Actions by and against executors and administrators.*]—With respect to actions for wrongs independent of contract done either to or by a deceased person in his lifetime, the rule of the common law was, *actio personalis moritur cum personâ ;* and the executor could neither sue nor be sued.

This rule still remains in force with respect to injuries to the person ; as, assault, battery, false imprisonment, libel, and slander : but by the 9 & 10 Vict. c. 93 (Lord Campbell's Act), with respect to injuries to the person from the wrongful act or default of another resulting in death, an action is given to the executor or administrator of the deceased for the benefit of the relatives of the deceased. *See post*, 284.

For injuries to the personal estate of the testator an action was given to the executor by the statute 4 Edw. III. c. 7, which was afterwards

Against a Carrier by the Executor or Administrator of a Passenger killed by the Negligence of the Defendant, for the Benefit of his Family. (9 & 10 *Vict. c.* 93.) (*a*)

[*Commence with one of the forms, ante, pp.* 7, 8.]—That the defendants were carriers of passengers upon a railway from —— to

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extended to executors of executors by 25 Edw. III. c. 5, and to administrators upon their institution under the 31 Edw. III. c. 11. Upon the construction of this statute an executor now has the same action for any injury done to the personal estate of the testator in his lifetime, whereby it has become less beneficial to the executor, as the testator himself might have had. (1 Wms. Saund. 217 *b*.)

For injuries to the real estate of the deceased in his lifetime an action is given to the executor by the statute 3 & 4 Will. IV. c. 42. By s. 2, after reciting that no remedy is provided by law for injuries to the real estate of any person deceased committed in his lifetime, it is enacted "that an action may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages when recovered shall be part of the personal estate of such person."

And with respect to injuries done by a person deceased in his lifetime to another in respect of his property real or personal, the last-mentioned statute, by s. 2, after reciting that no remedy is provided by law for such injuries, enacts "that an action may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

See further as to actions by and against executors for wrongs, Wms. Exs. 5th ed. 704; 1564.

(*a*) By the 9 & 10 Vict. c. 93 (Lord Campbell's Act), s. 1, it is enacted, "that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By s. 2, it is enacted "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." By s. 3, it is provided "that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be

—— for reward to the defendants; and the said *C. D.* in his lifetime became and was received by the defendants as a passenger to be by them as such carriers safely and securely carried upon the said railway on a journey from —— to —— aforesaid, for reward to the defendants; yet the defendants did not safely and securely carry the said *C. D.* upon the said railway on the said journey, and so negligently and unskilfully conducted themselves in that behalf that the said *C. D.* was thereby wounded and injured and by reason of the wounds and injuries thereby occasioned to him as aforesaid the said *C. D.* afterwards, and within twelve calendar months next before this suit, died; and the plaintiff as executor [*or* administrator] as aforesaid, for the benefit of *I. D.* the wife, and *K. D.* and *L. D.* and *M. D.*, children of the said *C. D.* [*as the case may be*], according to the statute in such case made and provided, claims £——.

Like counts: Hutchinson v. *York, Newcastle and Berwick Ry. Co.*, 5 Ex. 343; *Dalton* v. *South-eastern Ry. Co.*, 27 L. J. C. P. 227; 4 C. B. N. S. 296; *Birkett* v. *Whitehaven Junction Ry. Co.*, 28 L. J. Ex. 348; 4 H. & N. 730.

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commenced within twelve months after the death of such deceased person." By s. 4, "that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered." By s. 5, the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

The defendant is liable for negligence at the suit of the representative under this statute only where he would have been liable to an action for the same cause at the suit of the deceased had he survived. Thus, where a servant is killed in the employment of his master, the master is not liable for negligence for which the servant could not have sued him. (*Senior* v. *Ward*, 28 L. J. Q. B. 139.) It has been said that the action given to the representative is a new remedy and not the same with that which accrued to the deceased. (*Blake* v. *Midland Ry. Co.*, 18 Q. B. 93.) If so, it may not perhaps be barred by an accord and satisfaction made with the latter, or a release executed by him before his death. In estimating the damages in this action the reasonable expectation of pecuniary advantage which the surviving relatives had from the deceased is to be taken into account, and the probable pecuniary loss sustained by his death. Funeral and mourning expenses are not to be included. (*Dalton* v. *South-eastern Ry. Co.*, 27 L. J. C. P. 227; 4 C. B. N. S. 296; *Franklin* v. *South-eastern Ry. Co.*, 3 H. & N. 211.) The pecuniary loss is the only damage recoverable (*Blake* v. *Midland Ry. Co.*, 18 Q. B. 93), but it need not be stated in the declaration. (*Chapman* v. *Rothwell*, 27 L. J. Q. B. 315.) Actual damage to the parties on whose behalf the action is brought must be proved, and the plaintiff is not entitled to a verdict with nominal damages on proof merely of the death by negligence. (*Duckworth* v. *Johnson*, 29 L. J. Ex. 25; 4 H. & N. 653.) The declaration need not negative the existence of any relations entitled to compensation other than those named therein. (*Barnes* v. *Ward*, 9 C. B. 392.)

Like counts for accidental deaths occasioned by defendants leaving a drawbridge open at night: Manley v. *St. Helen's Canal Co.*, 2 H. & N. 840; 27 L. J. Ex. 159.

By defendants negligently managing an engine: Vose v. *Lancashire and Yorkshire Ry. Co.*, 2 H. & N. 728; 27 L. J. Ex. 249.

By defendant keeping a trap-door in a passage open: Chapman v. *Rothwell*, 27 L. J. Q. B. 315.

By defendant keeping an open area adjoining the highway: Barnes v. *Ward*, 9 C. B. 392.

By defendant's omnibus running over the plaintiff: Cotton v. *Wood*, 29 L. J. C. P. 333; 8 C. B. N. S. 568.

By the fall of defendant's wall into the highway on the deceased: Duckworth v. *Johnson*, 29 L. J. Ex. 25; 4 H. & N. 653.

Particulars under the above Count.

In the ——.

Between *A. B.*, executor of the last will and testament [*or* administrator of the goods, chattels, and credits] of *C. D.*, deceased, plaintiff, and *G. H.*, defendant.

The following is a full particular of the persons for whom and on whose behalf this action is brought, namely, *I. D.*, the wife, and *K. D.* and *L. D.* and *M. D.*, the children of the said *C. D.* [*as the case may be*]. And the following is a full particular of the nature of the claim in respect of which damages are sought to be recovered in this action, namely [*state the nature of the claim according to the fact*].

Dated ——.

Yours, etc.,

E. F., plaintiff's attorney.

To *N. O.*, defendant's attorney [*or* "agent"].

Fences (*a*).

Count for not Repairing the Fences between adjacent closes of land.

(*Venue local.*) That at the time of the committing of the grievances hereinafter mentioned the plaintiff was possessed and in the

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(*a*) The general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others. But the owner of land may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land who may have a corresponding right to have the fence so maintained and repaired. (1 Wms. Saund. 322 *a*; *Churchill* v. *Evans*, 1 Taunt. 529; *Dovaston* v. *Payne*, 2 H. Bl. 527; and see *Ricketts* v. *East and West India Docks Ry. Co.*, 12 C. B. 160.)

Where cattle trespass on the plaintiff's land through a defect in the fence which the defendant is bound to repair, the plaintiff may maintain an action in the above form in respect of the damage done, or he may maintain an action of trespass against the owner of the cattle (*see post*, "*trespass*"), or he may distrain the cattle *damage feasant*.

Where cattle escape from the plaintiff's land through a defect in the fence which the defendant is bound to repair, the plaintiff may maintain an action for not repairing the fence in respect of any damage thereby occa-

occupation of a close of land, and the defendant was possessed and in the occupation of another close of land next adjoining the said close of the plaintiff, and divided therefrom by a fence; and the defendant, by reason of the possession of his said close, then of right ought to have maintained and repaired, and kept maintained and repaired the said fence so as to prevent cattle lawfully feeding and depasturing, or being in the said respective closes, from escaping from and out of the one into the other of the said closes, through defects of the said fence; yet the defendant suffered the said fence to be and continue, and the same was out of repair, whereby divers cattle of the plaintiff then lawfully being in the said close of the plaintiff, escaped through the said fence, out of the said close of the plaintiff into the said close of the defendant, and were lost to the plaintiff; [and divers other cattle, as well of the defendant as of other persons, then being in the said close of the defendant, escaped through the said fence, out of the said close of the defendant into the said close of the plaintiff, and trod down, consumed, and spoiled the grass and herbage of the last-mentioned close.]

Count for not repairing the fences of a close adjoining that of the plaintiff, whereby a horse of the plaintiff fell through and was killed: *Rooth* v. *Wilson*, 1 B. & Ald. 59.

Count for not repairing the fences of the adjoining close, whereby the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack: *Powell* v. *Salisbury*, 2 Y. & J. 391.

Counts against railway companies on the statutory obligation to maintain fences between the railway and the adjoining land, under the Railways Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 20, *s.* 68): *Ricketts* v. *East and West India Docks Ry. Co.*, 12 C. B. 160; *Bessant* v. *Great Western Ry. Co.*, 8 C. B. N. S. 368; *Marfell* v. *South Wales Ry. Co.*, 8 C. B. N. S. 525; *and see Roberts* v. *Great Western Ry. Co.*, 27 L. J. C. P. 266; *and Sharrod* v. *London and North-Western Ry. Co.*, 4 Ex. 580.

Count against a railway company for not maintaining sufficient gates or stiles on a level crossing, under the Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20, *s.* 61): *Ellis* v. *London and*

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sioned to his cattle, or even to cattle not his own but kept by him on his land for another person, to whom he was liable. (*Rooth* v. *Wilson*, 1 B. & Ald. 59; and see *Carruthers* v. *Hollis*, 8 A. & E. 113; *Singleton* v. *Williamson*, 31 L. J. Ex. 17.)

A plaintiff whose cattle trespassed on the land adjoining the defendant's cannot maintain an action against him for damage occasioned to them by the defect in the fence, although the defendant is bound to repair it as against the owner of the adjoining land. (*Ricketts* v. *East & West India Docks Ry. Co.*, 12 C. B. 160.)

So where the defendant was bound to repair the fence between his land and the highway it was held that the plaintiff, in order to maintain this action, must show that his cattle were lawfully using the highway. (*Dovaston* v. *Payne*, 2 H. Bl. 527.)

The action must be brought against the person bound to repair, who is, in general, the occupier and not the owner. (*Cheetham* v. *Hampton*, 4 T. R. 318.)

South-western Ry. Co., 26 L. J. Ex. 349; 2 H. & N. 424; *and see Fawcett* v. *York and North Midland Ry. Co.*, 16 Q. B. 610.

Count for not fencing a shaft of the defendant's mine in the plaintiff's close, whereby the plaintiff's horse fell in and was killed: Sybray v. *White*, 1 M. & W. 435.

Ferry (*a*).

Count for Disturbing the Plaintiff's Ferry.

(*Venue local.*) That the plaintiff was possessed of an ancient ferry, called —— ferry, for the carriage [of foot-passengers and their goods] across the river ——, from —— to ——, taking for the carriage of such [passengers and goods] across such ferry certain reasonable freights and ferryages; and the defendant wrongfully disturbed the plaintiff in the possession of his said ferry by carrying divers [foot-passengers and their goods] for hire across the said river near to the said ferry of the plaintiff; whereby the plaintiff has lost the profits of his said ferry.

Like counts: Huzzey v. *Field*, 2 C. M. & R. 432; *Peter* v. *Kendal*, 6 B. & C. 703; *Pim* v. *Curell*, 6 M. & W. 234; *Blacketer* v. *Gillett*, 9 C. B. 26; *Giles* v. *Groves*, 12 Q. B. 721; *Newton* v. *Cubitt*, 28 L. J. C. P. 176; 5 C. B. N. S. 627.

Fishery.

Count for Trespass to the Plaintiff's Fishery.

(*Venue local.*) That the defendant, on divers days and times, broke and entered the several fishery of the plaintiff in the river ——, and fished in the said fishery for fish, and chased and disturbed the fish therein, and caught, took and carried away and converted to his own use divers quantities of the plaintiff's fish therein.

Like counts: Smith v. *Kemp*, 2 Salk. 637; *Richardson* v. *Mayor of Orford*, 2 H. Bl. 182; *Mannall* v. *Fisher*, 5 C. B. N. S. 856.

Count for injuring oyster beds of the plaintiff: Mayor of Colchester v. *Brooke*, 7 Q. B. 339.

Count for a trespass in throwing down a weir of the plaintiff appurtenant to his fishery: Williams v. *Wilcox*, 8 A. & E. 314.

(*a*) As to the mode of describing the right see "Common," *ante*, p. 249, "Ways," *post*, 369. Where the declaration described the ferry as to and

Fixtures.

Count for depriving the Plaintiff of Fixtures (a).

That the defendant for a long time wrongfully deprived the plaintiff of the use and possession of the plaintiff's fixtures and goods, that is to say, lathes, machines, and machinery in and affixed to a foundry and premises at ——, whereby the plaintiff lost the use and benefit of the said fixtures and goods and the advantages which he would otherwise have derived therefrom.

A like count: London and Westminster Loan and Discount Co. v. *Drake*, 28 L. J. C. P. 297; 6 C. B. N. S. 798.

Fraud (b).

For Fraud in selling Goods by a false Warranty.

That the defendant, by fraudulently warranting a horse to be then sound, induced the plaintiff to buy the said horse from the defendant for £——, which the plaintiff paid to the defendant; whereas the said horse was not then sound, as the defendant then well knew;

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from certain places across a river, and the right proved was for a ferry one way only, it was held that the allegation was divisible, and the plaintiff was entitled to have the verdict entered for so much of the right as was proved. (*Giles* v. *Groves*, 12 Q. B. 721.)

(*a*) If the fixtures have not been removed they form part of the realty, and in an action for an injury to them the venue is local. If the fixtures have been removed and carried away, the plaintiff may sue for a wrongful conversion: and see further as to "Fixtures," *ante*, pp. 133, 254.

(*b*) *Fraud.*]—An action to recover damages arising from fraud will lie where the defendant has stated or represented as a matter of fact what is untrue, knowing it to be untrue, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss. (*Pasley* v. *Freeman*, 3 T. R. 51; 2 Smith's L. C. 5th ed. 68; *Langridge* v. *Levy*, 2 M. & W. 519; *Eastwood* v. *Bain*, 28 L. J. Ex. 74; *Behn* v. *Kemble*, 7 C. B. N. S. 260; *Bedford* v. *Bagshaw*, 29 L. J. Ex. 59.) Such action will not lie upon a statement made by the defendant without knowledge whether it is false or true, or without an intention of inducing the plaintiff to act upon it. (*Rawlings* v. *Bell*, 1 C. B. 951; *Barley* v. *Walford*, 9 Q. B. 197; and see *Freeman* v. *Cooke*, 2 Ex. 654.) And it seems that it will not lie upon a statement made by the defendant without knowing whether it is false or true, and with the intention of inducing the plaintiff to act upon it, if the defendant believed it to be true. (*Cornfoot* v. *Fowke*, 6 M. & W. 358; *Evans* v. *Collins*, 5 Q. B. 804; *Shrewsbury* v. *Blount*, 2 M. & G. 475; *Ormrod* v. *Huth*, 14 M. & W. 651.) But if under the last-mentioned circumstances the defendant did not believe it to be true the action will lie. (*Taylor* v. *Ashton*, 11 M. & W. 401, 415; *Rawlins* v. *Wickham*, 28 L. J. C. 188; *Evans* v. *Edmonds*, 13 C. B. 777.) And the defendant is also responsible for false statements made through defect of memory. (*Slim* v. *Croucher*, 29 L. J. C. 273.) As to fraudulent concealment, see *Horsfall* v. *Thomas*, 10 W. R. Ex. 640; and the cases cited *post*, p. 291.

Upon an express warranty given on a sale, or where the contract of sale implies a warranty, the declaration may be framed either upon the contract, or upon the wrong; and in such case the defendant's knowledge of the defect is immaterial, and if laid in the declaration need not be proved.

whereby the said horse was of no use to the plaintiff, and he incurred expense in keeping it and in the resale of the same, and also a loss upon such resale.

For Fraud in selling a Picture by a false Representation that it was painted by a certain Master.

That the defendant, by fraudulently representing to the plaintiff that a certain picture was painted by ——, induced the plaintiff to buy the said picture for £——, which the plaintiff paid to the defendant; whereas the said picture was not painted by ——, as the defendant at the time of making the said representation and of the said purchase well knew; whereby the plaintiff lost the said £——.

Like counts: Milne v. *Marwood*, 15 C. B. 778; *Power* v. *Barham*, 4 A. & E. 473.

Count for fraud in selling goods by a false representation that they corresponded with samples shown: Ormrod v. *Huth*, 14 M. & W. 651; *Meyer* v. *Everth*, 4 Camp. 22.

For fraud in selling a cargo of wheat by a false representation that it accorded with a report and samples: Russell v. *Nicolopulo*, 8 C. B. N. S. 362.

For selling the cargo of a ship by a false representation that the ship was on its voyage: Risbourg v. *Bruckner*, 3 C. B. N. S. 812.

Against a manufacturer for fraud in selling goods by a false representation that they were fit for a particular purpose: Jones v. *Bright*, 5 Bing. 533; *and see Laing* v. *Fidgeon*, 6 Taunt. 108; *ante*, p. 234.

For fraud in selling an insufficient crane rope for a crane to raise casks of wine: Brown v. *Edgington*, 2 M. & G. 279.

For fraud in selling a dangerous gun to be used by the purchaser and also his sons, one of whom being injured by its bursting brought the action: Langridge v. *Levy*, 2 M. & W. 519.

(*Williamson* v. *Allison*, 2 East, 446; *Brown* v. *Edgington*, 2 M. & G. 279; see forms upon the contract, *ante*, "*Warranties*," p. 229.) Where no warranty exists in the contract, but the contract is induced by false representations, known by the seller to be false, the action is grounded on the fraud and should be so framed. (*Ormrod* v. *Huth*, 14 M. & W. 651; *Meyer* v. *Everth*, 4 Camp. 22.) The knowledge of the defendant is in such case essential to the cause of action. (*Ib.*; *Freeman* v. *Baker*, 5 B. & Ad. 797; see note to *Pasley* v. *Freeman*, 2 Smith, L. C. 5th ed. 68.) A count for fraud should be joined with a count for a breach of warranty where it is doubtful whether a warranty can be proved.

If a declaration discloses a state of facts upon which an action may be maintained without fraud, fraud need not be proved although it be alleged; and the plaintiff may recover upon the facts disclosed though fraud be alleged and disproved. (*Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890, 921.) The words "falsely and fraudulently" may be struck out of a declaration provided there is left a good cause of action. (Per Parke, B., *Thom* v. *Bigland*, 8 Ex. 725.)

For fraudulently Concealing a Defect upon the Sale of a Horse to the Plaintiff.

That the defendant was possessed of a horse which, as the defendant then well knew, was diseased, and the defendant, by then fraudulently concealing from the plaintiff that the said horse was diseased and representing to him that it was sound, induced the plaintiff to buy the said horse for £——, which the plaintiff paid to the defendant; whereby the plaintiff lost the said £——.

Count for selling a ship as copper-fastened, and fraudulently keeping it afloat to prevent an examination of the bottom: Freeman v. *Baker*, 5 B. & Ad. 797.

For selling a log of mahogany by fraudulently concealing that it was unsound: Udell v. *Atherton*, 30 L. J. Ex. 337.

For a fraudulent Misrepresentation of the Value of a Business, whereby the Plaintiff was induced to purchase it.

That the defendant kept a public house, and there carried on the business of a publican, and was possessed of a lease of the said house for an unexpired term of years, and of certain fixtures, goods, and stock in trade in the said house, and of the goodwill of the said business; and thereupon the defendant, with the intent to induce the plaintiff to purchase the said lease, fixtures, goods, stock in trade, and goodwill from the defendant for the price of £——, represented to the plaintiff that the said public house was then a free public house, that is to say, that the same was free from the control or interference of any particular brewer, and that the trade of the said public house had been and then was £—— per month, all retail over the counter; whereas the said public house was not then a free public house as aforesaid, and the trade of the said public house had not been and was not then £—— per month, all retail over the counter, as the defendant then well knew; and the defendant by the said representation induced the plaintiff to purchase the said lease, fixtures, goods, stock in trade, and goodwill from the defendant for the price of £——, which the plaintiff then paid to the defendant for the same; whereby the said lease, fixtures, goods, stock in trade, and goodwill were of no use to the plaintiff, and he lost the said £——, and incurred expenses in carrying on the said business and in disposing of the said lease, fixtures, goods, stock in trade, and goodwill.

A like count: Roles v. *Davis*, 28 L. J. Ex. 287; 4 H. & N. 484.

A like count for the sale of a business of a potato salesman by misrepresentation of its value: Mummery v. *Paul*, 1 C. B. 316.

Count for inducing the plaintiff to buy a public house from a third party by false representations made by the defendant respecting the business: Richardson v. *Dunn*, 30 L. J. C. P. 44; 8 C. B. N. S. 655.

By the purchaser of land against the vendor for fraudulently representing that the land was unincumbered: Sikes v. *Wild*, 30 L. J. Q. B. 325.

By the purchaser of a house against the vendor for fraudulent mis-

representation by his agent that the house was free from rates and taxes: Fuller v. *Wilson*, 3 Q. B. 58; *and see Cornfoot* v. *Fowke*, 6 M. & W. 358.

Count against a director of a mining company for fraudulent representations made to the committee of the Stock Exchange, in order to get the shares of the company inserted in the official list of the committee, whereby the plaintiff was induced to purchase shares: Lane v. *Bagshaw*, 16 C. B. 576; *Bedford* v. *Bagshaw*, 29 L. J. Ex. 59; 4 H. & N. 538.

Count against the directors of a bank for making a false report as to its prosperous condition, whereby the plaintiff was induced to take shares: Taylor v. *Ashton*, 11 M. & W. 401; *Gerhard* v. *Bates*, 2 E. & B. 476; *and see re Royal British Bank, ex parte Nicol*, 28 L. J. C. 257; *Scott* v. *Dixon*, 29 L. J. Ex. 62, *n.*

Like counts against the directors of a mining company: Shrewsbury v. *Blount*, 2 M. & G. 475; *Clarke* v. *Dickson*, 28 L. J. C. P. 225; 6 C. B. N. S. 453.

Against directors of a company for falsely representing that they had authority to order the acceptance of a bill: Eastwood v. *Bain*, 28 L. J. Ex. 74.

Against an insurance company for misrepresenting their mode of conducting business, whereby the plaintiff was induced to insure: Pontifex v. *Bignold*, 3 M. & G. 63.

For inducing the plaintiff to sell goods for the defendant by misrepresenting that he had authority to sell: Adamson v. *Jarvis*, 4 Bing. 66.

For inducing the plaintiff to accept bills upon the security of goods by the false representation of the defendant that he was the owner of the goods: Dyster v. *Battye*, 3 B. & Ald. 448.

For a false representation that the defendant had authority to accept a bill for the drawee, whereby the plaintiff sued the drawee and failed to recover: Polhill v. *Walter*, 3 B. & Ad. 114.

For a false representation by the defendant that he had received goods for the plaintiff which the plaintiff had purchased, whereby the plaintiff was induced to pay the vendor: Coleman v. *Riches*, 16 C. B. 104.

For a fraudulent misrepresentation that a pattern which the plaintiff, a printer of silks, was using was a registered pattern, whereby the plaintiff was induced to abstain from using it: Barley v. *Walford*, 9 Q. B. 197.

For fraudulently inducing the plaintiff to use the trade marks of another manufacturer, whereby he was subjected to a Chancery suit for an injunction: Dixon v. *Fawcus*, 30 L. J. Q. B. 137.

By the sheriff against an attorney who had sued out a writ of ca. sa. for inducing the sheriff to take the wrong person: Evans v. *Collins*, 5 Q. B. 804.

By the sheriff against the execution creditor for pointing out the

wrong goods to be taken under a fi. fa.: Humphrys v. *Pratt*, 5 Bligh, N. S. 154; *Childers* v. *Wooler*, 29 L. J. Q. B. 129.

For fraudulently representing that a third Person might be trusted with Goods on Credit (a).

That the defendant fraudulently represented to the plaintiff that *G. H.* then held a responsible situation, and was in good circumstances, and might safely be trusted with goods on credit; whereas the said *G. H.* did not then hold a responsible situation, and was not then in good circumstances, and could not then safely be trusted with goods on credit, as the defendant then well knew; and the defendant by so representing as aforesaid induced the plaintiff to sell and deliver to the said *G. H.* goods on credit; whereby the plaintiff lost the price of the said goods, and incurred expense in endeavouring to recover the same.

Like counts: Pasley v. *Freeman*, 3 T. R. 51, 2 Smith's L. C. 5th ed. 862; *Eyre* v. *Dunsford*, 1 East, 318; *Corbett* v. *Brown*, 8 Bing. 33; *Tatton* v. *Wade*, 18 C. B. 371; 25 L. J. C. P. 240.

For inducing the plaintiff to lend money to a third party on the security of his promissory note only, by misrepresentations as to his credit and estate: Swann v. *Phillips*, 8 A. & E. 457; *Turnley* v. *Macgregor*, 6 M. & G. 46.

For misrepresentations made by the defendant as to the credit of a firm in which he was a partner: Devaux v. *Steinkeller*, 6 Bing. N. C. 84.

For inducing the plaintiff to employ an agent by giving him a false character: Foster v. *Charles*, 6 Bing. 396; 7 Bing. 105; *to take a dishonest clerk: Wilkin* v. *Reed*, 15 C. B. 192.

Highways (b).

(a) By 9 Geo. IV. c. 14, s. 6 (Lord Tenterden's Act), "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith." A representation partly written and partly verbal is sufficient, if the written part formed a material part of the representation. (*Tatton* v. *Wade*, 18 C. B. 371; 25 L. J. C. P. 240; and see *Clarke* v. *Dickson*, 28 L. J. C. P. 225.) It is not necessary to aver in the declaration that the representation was in writing, that being merely required by statute and a matter of evidence.

(b) *Highways.*]—By the 5 & 6 Will. IV. c. 50 (relating to highways in general), s. 109, it is enacted, "that no action or suit shall be commenced against any person for anything done in pursuance of or under the

Hundredors.

Commencement and conclusion of declaration in actions against hundredors, see ante, p. 26.

Actions against the inhabitants of a hundred to recover damages for an injury done to machinery, etc., feloniously destroyed by persons riotously assembled, under 7 & 8 Geo. IV. c. 31 : *Lowe* v. *Hundred of Broxtowe*, 3 B. & Ad. 550 ; *Duke of Newcastle* v. *Broxtowe*, 4 B. & Ad. 273 ; *Birley* v. *Salford*, 11 M. & W. 391 ; *and see as to proceedings against hundredors, Chit. Statutes, title,* "*Hundred,*" 2 Chit. Pr. 11th ed. 1187.

Husband and Wife (*a*).

authority of this Act until twenty-one days' notice (which must now be a calendar month's notice by the 5 & 6 Vict. c. 97) has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after three calendar months next after the facts committed for which such action or suit shall be so brought ; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place ; and the defendant in such case or suit may plead the general issue, and give this Act and every special matter in evidence at any trial which shall be had thereupon ; and if the matter or thing shall appear to have been done under or by virtue of this Act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein ; and if a verdict shall be found for such defendant, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if upon any demurrer in such action judgment shall be given for the defendant therein, then and in any of the cases aforesaid such defendant shall have costs as between attorney and client, and shall have such remedy for recovering the same as any defendant may have for his or her costs in any other case by law." See *post*, c. 6, "*Notice of Action.*"

No action will lie against a surveyor of highways appointed under the above Act for damages caused to an individual by the non-repair of the highway. (*Young* v. *Davis*, 31 L. J. Ex. 250.)

(*a*) *Husband and Wife.*]—With respect to injuries to the person, or to the personal or real estate of the wife committed before the marriage, the husband and wife must join in suing ; the husband cannot sue alone. If the wife sue alone, the defect can be taken advantage of only by a plea in abatement. (*Milner* v. *Milnes*, 3 T. R. 627, 631.)

With respect to injuries to the person of the wife during coverture, the husband and the wife must join in suing. The husband cannot sue alone for damages in respect of the injury to the wife ; but may sue alone for the damages occasioned thereby to himself solely. If the wife sues alone, it is only matter for a plea in abatement. By the C. L. P. Act, 1852, s. 40, "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right."

A wife cannot sue in respect of any injuries to personal property during

By Husband for enticing away his Wife (a).

That *G. B.* was and is the wife of the plaintiff, and the defendant, well knowing the same, wrongfully enticed and procured the said *G.* unlawfully and without the consent and against the will of the plaintiff to depart and remain absent from the house and society of the plaintiff; whereby the plaintiff lost the society and services of the said *G.*

A like count: Winsmore v. *Greenbank*, Willes, 577.

By Husband for wrongfully harbouring his Wife.

That *G. B.* was and is the wife of the plaintiff, and unlawfully and without the consent and against the will of the plaintiff departed from the house and society of the plaintiff; and the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff received, harboured, and detained the said *G.*, and refused to deliver her to the plaintiff, although requested by the plaintiff so to do; whereby the plaintiff lost the society and services of the said *G.*

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the coverture, as all such property vests in the husband exclusively. The husband alone can sue for such injuries. (*Chambers* v. *Donaldson*, 9 East, 471; *Boggett* v. *Frier*, 11 East, 301; see *Shingler* v. *Holt*, 7 H. & N. 65.)

With respect to injuries done to the real property of which the husband and wife are seized or to which they are entitled in right of the wife during coverture, the husband may sue alone, or the husband and wife may join in suing. (*Bidgood* v. *Way*, 2 Bl. 1236; 1 Ch. Pl. 7th ed. 84; *Wallis* v. *Harrison*, 5 M. & W. 142.)

Upon the bankruptcy of the husband the assignees must join with the wife in suing upon causes of action in right of the wife which if vested in the husband would pass to the assignees, as for a conversion of the wife's goods before marriage; and the husband cannot join in the action. (*Richbell* v. *Alexander*, 30 L. J. C. P. 268; 10 C. B. N. S. 324.)

In respect of wrongs done by the wife before the marriage, or wrongs done by the wife during coverture, the husband and wife must be jointly sued. (2 Wms. Saund. 47, n.; *Vine* v. *Saunders*, 4 Bing. N. C. 96; *Catterall* v. *Kenyon*, 3 Q. B. 310.) They may be jointly sued for wrongs done by them jointly (*Ib.*; *Keyworth* v. *Hill*, 3 B. & Ald. 685.)

A married woman is liable for all torts committed by her, including frauds, except that when the fraud is directly connected with a contract and is the means of effecting it and part of the same transaction, she is exempt from liability; thus an action will not lie against husband and wife for a fraudulent representation by the wife that she was unmarried, whereby the plaintiffs were induced to take her promissory note. (*Liverpool Adelphi Loan Ass.* v. *Fairhurst*, 9 Ex. 422.) Where the wife fraudulently represented that a bill was accepted by her husband, whereby the plaintiff was induced to discount it, the court was equally divided as to whether an action would lie. (*Wright* v. *Leonard*, 30 L. J. C. P. 365.)

(*a*) By the 20 & 21 Vict. c. 85, s. 59, "no action shall be maintainable in England for criminal conversation." The above counts for enticing away and harbouring a wife disclose entirely distinct causes of action from the old action for criminal conversation, and are not affected by the above provision. It is possible that they may now be found useful.

Count by Husband and Wife [for a Trespass to the Wife] with a Count by the Husband in his own right for Damages sustained from the same [Trespass].

(*Commence with the form, ante, p.* 17.) That the defendant [assaulted and beat the said *C.*, then being the wife of the said *A. B.*]; whereby she became sick and wounded and permanently disabled, and suffered great pain for a long time. And the plaintiff, *A. B.*, also sues the defendant for [that the defendant committed the trespass *or* trespasses, *or* grievance *or* grievances] in the first count mentioned as therein alleged; whereby the plaintiff lost the comfort and services of the said *C.* for a long time, and will be permanently deprived thereof, and incurred expense in nursing her and for medical attendance [*conclude as in the form, ante, p.* 17].

By husband and wife for an injury to the wife arising from the defendant leaving an open cellar near a public highway, with a count by the husband alone for the damage sustained in his own right: Stone v. *Jackson*, 16 C. B. 199.

Count against husband and wife for an assault committed by the wife: Pursell v. *Horn*, 8 A. & E. 602.

Counts by and against husband and wife for conversion of goods: see "Conversion," ante, p. 257.

Imprisonment.

See *post*, "*Trespass to the Person*," p. 354.

Infants.

See *ante*, p. 18; *post*, c. 5, "*Infancy*."

Injunction (*a*).

Claim of a Writ of Injunction in an ordinary Case.

(*At the conclusion of the declaration, after the words* and the plaintiff claims £——, *add the claim of an injunction, according to the facts, which may be as follows or to the like effect:*) And the

(*a*) *Claim of a writ of injunction under the C. L. P. Act*, 1854.]—By s. 79, "in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of

plaintiff also claims a writ of injunction to restrain the defendant from the continuance and repetition of the injuries above complained of, and the committal of other injuries of a like kind relating to the same right.

Claim of a Writ of Injunction in an Action for the Infringement of a Patent or of a Copyright (*a*).

(*At the conclusion of the declaration, after the words* and the

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contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress." By s. 81 the proceedings in such action shall be the same, as nearly as may be, and subject to the like control as the proceedings in an action to obtain a mandamus under the provisions of the Act. (See *post*, p. 309.) As to the practice under these provisions, see 2 Chit. Pr. 11th ed. 1103–1111; Chit. Forms, 9th ed. 627. The above sections do not apply to actions of ejectment. (*Baylis* v. *Legros*, 26 L. J. C. P. 176; 2 C. B. N. S. 316.)

The plaintiff having sued for liquidated damages for breach of an agreement under which such damages were stipulated for, was held not entitled to an injunction to restrain the breach of the same agreement; aliter, if he sued for unliquidated damages. (*Carnes* v. *Nesbitt*, 30 L. J. Ex. 348; 31 Ib. 273.)

The following form of indorsement on a writ of summons of a claim of a writ of injunction under the statute is given by the R. M. V. 1854, sched. 36:—

"The plaintiff intends to claim a writ of injunction to restrain the defendant from [*here state concisely for what the writ of injunction is required, as for example, thus:* "felling or cutting down any timber or trees standing, growing, or being in or upon the land and premises at ——, in the county of ——, and from committing any further or other waste or spoil in or upon the said land or premises"]. And take notice, that in default of the defendant's entering an appearance as within commanded, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such writ."

By the C. L. P. Act, 1860, s. 32, it is enacted, that "in all cases in which a writ of mandamus or of injunction is issued under the provisions of 'The Common Law Procedure Act, 1854,' such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable."

By s. 33, "Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a mandamus, or by writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery."

(*a*) By the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 42, in any action in any of the superior courts at Westminster for the infringement of letters-patent, the court may, on the application of the plaintiff or defendant respectively, make such order for an injunction, inspection, or account, and give such directions respecting the same as to such court may seem fit. As to the mode of proceedings under this section, see *Gittins* v. *Symes*, 15 C. B. 362; and see *post*, "*Patents*," 330.

plaintiff claims £——, *add,*) And the plaintiff also claims a writ of injunction to restrain the defendant from a continuance and repetition of the said injury, and the committal of any injury of a like kind by the defendant relating to the said patent [*or* copyright].

Claim of an injunction to restrain the infringement of a patent: Gittens v. *Symes,* 15 C. B. 362; *Hills* v. *London Gas Light Co.,* 5 H. & N. 312.

Claim of a writ of injunction to restrain the continuance of a nuisance in carrying on a noxious trade: De la Rue v. *Fortescue,* 26 L. J. Ex. 339; 2 H. & N. 324.

Claim of an injunction to restrain the defendant from continuing to obstruct the lights of the plaintiff by a wall: Jessel v. *Chaplin,* 2 Jur. N. S. 931; 4 W. R. 610. (*a*)

Innkeeper (*b*).

Against an Innkeeper for refusing to Lodge the Plaintiff.

That the defendant was an innkeeper and kept a common inn for the accommodation of travellers, and the plaintiff then being a traveller came to the said inn and required the defendant to receive and lodge the plaintiff as a guest in the said inn then and during the night then next ensuing, and the defendant then had sufficient room and accommodation in the said inn to receive and lodge the plaintiff therein as a guest then and during the said night, and the plaintiff was then ready and willing and offered the defendant to pay him a reasonable sum of money for such lodging, of all which premises the defendant then had notice; yet the defendant did not nor would receive and lodge the plaintiff as a guest in the said inn then and during the said night, whereby the plaintiff was obliged to procure a lodging elsewhere, and was put to inconvenience and expense.

Like counts: Fell v. *Knight,* 8 M. & W. 269; *Hawthorn* v. *Hammond,* 1 C. & K. 404.

Count by a Guest against an Innkeeper for the Loss of Goods (*c*).

That the defendant was an innkeeper and kept a common inn for

(*a*) It was held in this case that the injunction might be granted, although the effect of it was to compel the defendant to take down the wall.

(*b*) By the custom of the realm an innkeeper is bound to receive a guest at any hour of the day or night, provided the guest offers himself in proper condition to be received into the inn, and is ready to pay for his accommodation, and there is room to accommodate him. (*Fell* v. *Knight,* 8 M. & W. 269; *R.* v. *Ivens,* 7 C. & P. 213; *Hawthorn* v. *Hammond,* 1 C. & K. 404.)

(*c*) An innkeeper is not an insurer of the goods of his guests, but is liable only for negligence or default in keeping the goods by himself or his servants. (*Calye's Case,* 8 Co. Rep. 32; 1 Smith's L. C. 5th ed. 102; *Dawson* v. *Chamney,* 5 Q. B. 164.) The loss of the goods is presumptive evidence of such negligence, which it lies upon the innkeeper to rebut. He may do this

the accommodation of travellers, and the plaintiff as and being a traveller was received into the said inn by the defendant, and brought into the said inn as such traveller a carpet-bag of the plaintiff containing goods of the plaintiff, and the said bag and its contents were then and thence until and at the time of the loss hereinafter mentioned within the said inn, and the plaintiff during all that time abided as a traveller and guest in the said inn; yet the defendant did not keep the said bag and its contents safely and without diminution or loss, but the defendant and his servants so negligently conducted themselves in that behalf, that the said bag and its contents were by and through the default of the defendant and his servants in that behalf, wrongfully taken and carried away by some person to the plaintiff unknown, and are lost to the plaintiff.

Count for an injury done to the plaintiff's horse while in the stable of the innkeeper: Dawson v. *Chamney*, 5 Q. B. 164.

Count, framed in contract, against the executor of a deceased innkeeper for the loss of goods: Morgan v. *Ravey*, 30 L. J. Ex. 131; 6 H. & N. 265.

Judge (*a*).

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by showing that the loss happened by the negligence of the guest, or by the act of God or the Queen's enemies. (*Richmond* v. *Smith*, 8 B. & C. 9; *Armistead* v. *Wilde*, 17 Q. B. 261; *Morgan* v. *Ravey*, 6 H. & N. 265.) In order to exonerate the innkeeper, the negligence of the guest must have occasioned the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. (*Cashill* v. *Wright*, 6 E. & B. 891, 900.) The law implies a promise on the part of the innkeeper to take care of the goods of his guest according to his common law duty, and a count against him for loss of the goods may be framed either in tort as above or upon such promise. (*Morgan* v. *Ravey*, 6 H. & N. 265.)

The law casts no obligation on a lodging-house keeper to take care of the goods of his lodgers. (*Holder* v. *Soulby*, 29 L. J. C. P. 246; 8 C. B. N. S. 254.)

(*a*) No action will lie against a judge for an act within his jurisdiction, although it may be irregular or founded on an erroneous judgment. (*Calder* v. *Halket*, 3 Moore, P. C. 28; *Dicas* v. *Lord Brougham*, 6 C. & P. 249; *Kemp* v. *Neville*, 31 L. J. C. P. 158; 10 C. B. N. S. 523; and see the cases there cited.) But a judge is liable to an action of trespass for an act done by his authority for which he had no jurisdiction. (*Houlden* v. *Smith*, 14 Q. B. 841; and see *Beaurain* v. *Scott*, 3 Camp. 388.) A judge is responsible for mistakes of law respecting his jurisdiction; but is justified in determining his jurisdiction upon the facts as they appear before him, although they may subsequently be found to be false. (*Lowther* v. *Earl Radnor*, 8 East, 113; *Houlden* v. *Smith*, 14 Q. B. 841, 852; and see *Pease* v. *Chaytor*, 31 L. J. M. 1.)

The judge of a court is not answerable for the wrongful acts or defaults of the ministerial officers of the court in executing the commands of the

Justice of the Peace (*a*).

Count against a justice of the peace for a malicious conviction: Kirby v. *Simpson*, 10 Ex. 358; *Gelen* v. *Hall*, 27 L. J. M. 78; 2 H. & N. 379.

Against a justice of the peace for maliciously procuring the plaintiff to be arrested on a charge of assault and committing him for trial: Taylor v. *Nesfield*, 3 E. & B. 724.

Count against justices for seizing plaintiff's goods under a distress warrant for church rates after notice to dispute the validity of the rate: Pease v. *Chaytor*, 31 L. J. M. 1.

Landlord and Tenant.

See post, "*Replevin*," p. 337; "*Reversion*," p. 338; "*Waste*," p. 363; *as to the liability of a landlord for nuisances arising out of premises demised by him, see post*, p. 326.

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court. (*Holroyd* v. *Breare*, 2 B. & Ald. 473; *Tunno* v. *Morris*, 2 C. M. & R. 298.)

In an action of trespass against a judge for an act done by his command, the want of jurisdiction must be shown by the plaintiff under an issue raised by the plea of not guilty at common law, and no special plea is necessary. (*Calder* v. *Halket*, 3 Moore, P. C. 28, 76; *Dicas* v. *Lord Brougham*, 6 C. & P. 249; and see *Buron* v. *Denman*, 2 Ex. 167.)

As to the liability of a judge for defamatory words, see *ante*, p. 263, n.

As to actions against justices of the peace, see *infra*.

(*a*) By the Act 11 & 12 Vict. c. 44, to protect justices of the peace in the execution of their duty, it is enacted, by s. 1, "that every action against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause; and if, at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation he shall be non-suit, or a verdict shall be given for the defendant."

By s. 2, "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause; provided nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed, either upon appeal or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if

LIBEL. *See ante*, "*Defamation*," p. 262.

LIGHTS.

For Obstructing the plaintiff's Windows (*a*).

(*Venue local.*) That the plaintiff was possessed of a dwelling-house and was entitled to have the light and air enter therein through a certain window in the said dwelling-house; and the defendant prevented and obstructed the light and air from entering through the said window into the said dwelling-house by erecting a wall [*or* by

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it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant."

Magistrates are not liable for acting erroneously in point of law in matters within their jurisdiction, unless they act maliciously and without reasonable and probable cause; and the declaration must then be framed according to s. 1 of the statute. (*Somerville* v. *Mirehouse*, 3 L. T. N. S. 294.) They are liable for acts done without jurisdiction; and the declaration need not charge such acts as done maliciously and without reasonable and probable cause. (*Pease* v. *Chaytor*, 31 L. J. M. 1.)

By s. 8, "No action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of had been committed." (See *post*, c. 6, "*Limitations*.")

By s. 9, "No action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated; and upon the back thereof shall be indorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said attorney or agent, if such notice have been served by such attorney or agent." (See *post*, c. 6, "*Notice of action*.")

See further as to actions against justices, 2 Chit. Pr. 11th ed. 1258; Chit. Forms, 9th ed. 723; and see counts in trespass, *post*, p. 355.

(*a*) An absolute and indefeasible right to the access and use of light for a dwelling-house or other building is obtained by the enjoyment of it for twenty years without interruption, notwithstanding any local usage or custom to the contrary, unless the right was enjoyed by consent in writing. 2 & 3 Will. IV. c. 71, s. 3. (*Salters' Co.* v. *Jay*, 3 Q. B. 109; *Merchant Tailors Co.* v. *Truscott*, 25 L. J. Ex. 173; 11 Ex. 855.) If the plaintiff alters or enlarges his lights, or adds new ones, the defendant may obstruct them wholly, and the plaintiff has no right of action until he has reduced his lights to the original form and number. (*Garritt* v. *Sharp*, 3 A. & E. 325; *Renshaw* v. *Bean*, 18 Q. B. 112; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34; *Hutchinson* v. *Copestake*, 8 C. B. N. S. 102; 9 C. B. N. S. 863; 31 L. J. C. P. 19; *Jones* v. *Tapling*, 31 L. J. C. P. 110; *Binckes* v. *Pash*, 31 L.

keeping and continuing a wall before then wrongfully erected] near to the said window, whereby the said dwelling-house has been rendered dark, unwholesome, and of less value, and the plaintiff has incurred expense in opening other windows to obtain light and air in the said dwelling-house. [*The plaintiff may also claim an injunction under the C. L. P. Act*, 1854, *ante*, *p.* 296 (*Jessel* v. *Chaplin*, 4 W. R. 610; 2 Jur. N. S. 931).]

Like counts: Flight v. *Thomas*, 11 A. & E. 690; *Wells* v. *Ody*, 1 M. & W. 452; *Merchant Taylors Co.* v. *Truscott*, 25 L. J. Ex. 173; 11 Ex. 855; *Glave* v. *Harding*, 27 L. J. Ex. 286; *Wale* v. *Westminster Palace Hotel Co.*, 8 C. B. N. S. 276; *Davies* v. *Marshall*, 31 L. J. C. P. 61.

By a Reversioner for an Obstruction to the Light.

(*Venue local.*) That a dwelling-house was in the possession of *G. H.* as tenant thereof to the plaintiff, the reversion thereof then belonging to the plaintiff, in which said dwelling-house there of right were and still ought to be divers windows, through which the light and air of right ought to have entered and still ought to enter into the said dwelling-house; yet the defendant prevented and obstructed the light and air from entering through the said windows into the said dwelling-house, by erecting a wall near to the said windows; whereby the said dwelling-house was rendered dark, unwholesome, and of less value, and the plaintiff was injured in his reversionary estate therein.

Like counts: Turner v. *Sheffield and R. Ry. Co.*, 10 M. & W. 425; *Salters' Co.* v. *Jay*, 3 Q. B. 109; *Metropolitan Association, etc.* v. *Petch*, 27 L. J. C. P. 330; 5 C. B. N. S. 504; *Stokoe* v. *Singers*, 26 L. J. Q. B. 257; 8 E. & B. 31; *and see post*, "*Reversion*," *p.* 389.

Claim of an injunction to restrain the defendant from continuing to obstruct the lights of the plaintiff by a wall: Jessel v. *Chaplin*, 2

J. C. P. 121.) The defendant is not justified in obstructing ancient lights merely because the plaintiff has opened new ones, but only where in obstructing the new lights he unavoidably obstructs the ancient ones also. (*Binckes* v. *Pash*, 31 L. J. C. P. 121.)

The owner of ancient lights may improve his light through the old apertures, provided he does not increase them, as by altering or removing the window frames and bars. (*Turner* v. *Spooner*, 30 L. J. C. 801; *Cooper* v. *Hubbuck*, 31 L. J. C. 123.) The right to ancient lights is abandoned or extinguished by closing them up with the intention of abandoning them. (*Moore* v. *Rawson*, 3 B. & C. 332; and see *Jones* v. *Tapling*, 31 L. J. C. P. 110.)

The plaintiff, whether tenant or reversioner, may maintain repeated actions so long as the obstruction continues. (*Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290.) Or claim an injunction. (*Jessel* v. *Chapman*, *supra*.)

The right may be acquired by one tenant as against another tenant of land under the same landlord. (*Frewen* v. *Phillips*, 30 L. J. C. P. 356.)

A right to the passage of air is not within the statute, and cannot be acquired under it. (*Webb* v. *Bird*, 30 L. J. C. P. 384; 10 C. B. N. S. 268.)

Jur. N. S. 931; 4 W. R. 610 Ex.; *and see ante, "Injunction," p.* 296.

MAGISTRATE. *See "Justice of the Peace," ante, p.* 300.

MAINTENANCE (*a*).

Count for instigating a pauper to bring an action without reasonable and probable cause against the plaintiff, and for maintaining an action already commenced, wherein the pauper was nonsuited, but the plaintiff incurred expense: Pechell v. *Watson*, 8 M. & W. 691.

Count for instigating the bringing of an action against the plaintiff: Flight v. *Leman*, 4 Q. B. 883 [*held bad for not stating it to have been without reasonable or probable cause*].

MALICIOUS PROSECUTION (*b*).

(*a*) The statutes against maintenance are only declaratory of the common law (see 2 Inst. 208), and therefore the declaration need not charge the maintenance to have been committed against the form of the statute. (*Pechell* v. *Watson*, 8 M. & W. 691; see the statutes against champerty and maintenance, 1 Chit. Statutes, 422; see further as to maintenance, *post*, c. 5, "*Maintenance.*")

(*b*) *Malicious prosecution.*]—This cause of action consists in the prosecution by the defendant of legal proceedings, of a civil or criminal nature, against the plaintiff, maliciously and without any reasonable or probable cause; whereby the plaintiff is injured, as by being arrested and imprisoned, or put to expense. (*Johnstone* v. *Sutton*, 1 T. R. 493, 544.)

The declaration must accordingly state the legal proceedings instituted by the defendant against the plaintiff, and the termination of them in his favour (*Whitworth* v. *Hall*, 2 B. & Ad. 695; *Mellor* v. *Baddeley*, 2 C. & M. 675; *Barber* v. *Lissitor*, 29 L. J. C. P. 161; 7 C. B. N. S. 175); the absence of reasonable or probable cause for instituting the proceedings and the malice of the defendant in so doing (*Saxon* v. *Castle*, 6 A. & E. 652; *De Medina* v. *Grove*, 10 Q. B. 168; *Dimmock* v. *Bowley*, 26 L. J. C. P. 231; 2 C. B. N. S. 542); also the arrest or other loss or injury suffered by the plaintiff. (*Cotterell* v. *Jones*, 11 C. B. 713.) The termination of the proceedings in the plaintiff's favour is not essential to the cause of action, where the proceedings were *ex parte*, and the plaintiff had no opportunity of preventing an unfavourable termination, as where the defendant maliciously exhibited articles of the peace against him. (*Steward* v *Gromett*, 29 L. J. C. P. 170; 7 C. B. N. S. 191.)

In an action for maliciously arresting the plaintiff on a *ca. sa.* for a larger sum than was really due, it is not necessary that he should have obtained his discharge by an order of the court before action, because the illegality of the arrest does not depend upon the result of any legal proceedings, but only on the amount for which execution might issue. (*Gilding* v. *Eyre*, 31 L. J. C. P. 174; 10 C. B. N. S. 592.)

The absence of reasonable and probable cause is a question of law for the judge to determine; the facts and inferences of fact are for the jury.

Count for a Malicious Arrest on a capias obtained by the False and Malicious Pretence that there was a cause of Action (*a*).

That the defendant commenced an action against the plaintiff in the court of —— at Westminster, and maliciously and without reasonable or probable cause procured from a judge of one of the superior courts of law at Westminster, a special order of the said judge directing the now plaintiff to be held to bail for £—— in the said action, by then falsely and maliciously representing to the said judge by a false affidavit that he the defendant had a cause of action against the now plaintiff to the amount of £——; and thereupon, in pursuance of the said order, the defendant caused to be sued out of the said court of ——, in the said action, a writ of capias directed to the sheriff of ——, whereby the Queen commanded the said sheriff that [*set*

(*Panton* v. *Williams*, 2 Q. B. 169; 11 A. & E. 483; *Douglas* v. *Corbett*, 6 E. & B. 511.) As to what constitutes reasonable and probable cause see *James* v. *Phelps*, 11 A. & E. 483; *Haddrick* v. *Heslop*, 12 Q. B. 267; *Heslop* v. *Chapman*, 23 L. J. Q. B. 49; *Hinton* v. *Heather*, 14 M. & W. 131; *Busst* v. *Gibbons*, 30 L. J. Ex. 75; *Turner* v. *Ambler*, 10 Q. B. 252.)

The malice necessary to support this action consists in the defendant being actuated by indirect and improper motives. It is a question of fact for the jury, which may generally be inferred by them from the fact of the defendant having acted without reasonable and probable cause (*Mitchell* v. *Jenkins*, 5 B. & Ad. 588; and see *Moore* v. *Guardner*, 16 M. & W. 595; *Weston* v. *Beeman*, 27 L. J. Ex. 57); but a prosecution instituted with malicious motives is not a ground of action, unless also instituted without reasonable and probable cause. (See *Musgrove* v. *Newell*, 1 M. & W. 582.)

In an action for malicious prosecution of civil proceedings special damage must be charged in the declaration and proved in order to sustain the action. (*Cotterell* v. *Jones*, 11 C. B. 713.) The extra costs incurred in successfully defending a civil action, beyond the amount of costs awarded by the court, are not damage sufficient to maintain this action. (*Ib.*)

An action for malicious prosecution may be brought by joint plaintiffs, in respect of a joint damage, as for expenses jointly incurred in defending an action against them. (*Barratt* v. *Collins*, 10 Moore 446; *Pechell* v. *Watson*, 8 M. & W. 691.)

Where the action is in substance for a malicious prosecution, whether terminating in an arrest and imprisonment or not, it cannot be brought in the county court. (9 & 10 Vict. c. 95, s. 58; *Jones* v. *Currey*, 20 L. J. Q. B. 438; *Chivers* v *Savage*, 25 L. J. Q. B. 85; 5 E. & B. 697; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Hunt* v. *North Staffordshire Ry. Co.*, 2 H. & N. 451.)

(*a*) By the 3rd sect. of the 1 & 2 Vict. c. 110, which abolished arrest on mesne process in certain cases, the plaintiff in any action in which the defendant was previously liable to arrest may, at any time after the commencement of the suit and before final judgment, obtain an order for issuing a writ of capias, to arrest and hold the defendant to bail, on satisfying a judge by affidavit that the cause of action amounts to £20 or upwards, and that there is probable cause that the debtor is about to quit England unless forthwith apprehended. A warrant for an arrest may also be obtained on similar grounds from the Commissioners of Bankruptcy and judges of the county courts under the Absconding Debtors Act, 1851, 14 & 15 Vict. c. 52. If such an order or warrant is obtained maliciously, without any probable cause for supposing either that there is any cause of action or that the defendant is about to quit England, and the defendant is arrested, he may sue the plaintiff in an action for the malicious arrest.

out the writ: see post, "Sheriff," p. 344]; and the defendant caused the said writ to be endorsed for bail for £——, and to be delivered to the said sheriff to be executed, and caused the plaintiff to be arrested by virtue of the said writ, and to be detained and imprisoned thereon for a long time [until the plaintiff and certain other persons became bound by bond to the said sheriff for the plaintiff's causing special bail to be put in for him to the said action as required by the said writ, *or as the case may be*]; and such proceedings were thereupon had in the said action that the now plaintiff obtained final judgment [of non pros., *or* nonsuit, *or state generally* of nil capiat] therein against the now defendant, whereby the said action was determined; and by reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment, and in defending the said action.

Like counts: where the action was terminated by a rule of court ordering the plaintiff to be discharged from arrest, and proceedings to be stayed: Brook v. *Carpenter*, 3 Bing. 297, 303.

Where no declaration was filed within a year after the return of the writ: Pierce v. *Street*, 3 B. & Ad. 397; *Norrish* v. *Richards*, 3 A. & E. 733; *Ireland* v. *Berry*, 5 Q. B. 551.

Where the action was terminated by an order to stay proceedings: Austin v. *Debnam*, 3 B. & C. 139.

For a Malicious Arrest on a Capias obtained by the False and Malicious Pretence that the Plaintiff was about to quit England.

That the defendant commenced an action against the plaintiff in the court of —— at Westminster, and maliciously and without any reasonable or probable cause procured from a judge of one of the superior courts of law at Westminster, a special order of the said judge directing the now plaintiff to be held to bail for £—— in the said action, by then falsely and maliciously representing to the said judge by a false affidavit that the plaintiff was then about to quit England, unless forthwith apprehended; and thereupon, in pursuance of the said order, the defendant caused to be sued out of the said court of ——, in the said action, a writ of capias, directed to the sheriff of ——, whereby the Queen commanded the said sheriff, that [*set out the writ: see post, "Sheriff," p.* 344], and the defendant caused the said writ to be endorsed for bail for £——, and to be delivered to the said sheriff to be executed, and caused the plaintiff to be arrested by virtue of the said writ, and to be detained and imprisoned thereon for a long time, until the plaintiff applied to the said judge to be discharged out of the custody of the said sheriff, on the ground that the now plaintiff was not about to quit England as aforesaid, and such proceedings were thereupon had in the matter of the said application, that afterwards, by an order duly made in the said action by the said judge, it was ordered that the now plaintiff should be discharged out of the custody of the said sheriff, on the ground that the now plaintiff was not about to quit England as aforesaid [*stating the substance of the order according to the fact*]; and by

reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment.

Like counts: Petrie v. *Lamont*, 3 M. & G. 702; *Daniels* v. *Fielding*, 16 M. & W. 200.

Counts for Malicious Arrest on final Process (*a*).

For arresting the plaintiff on a writ of ca. sa., after he had been previously arrested on a concurrent writ and had paid the debt: Tebbut v. *Holt*, C. & K. 282; *Lewis* v. *Morris*, 2 C. & M. 712.

For refusing to discharge the plaintiff arrested under a ca. sa. after tender of the debt and costs: Crozer v. *Pilling*, 4 B. & C. 26.

For detaining the plaintiff in custody under an attachment from the Court of Chancery for non-payment of the costs of a suit after payment: Moore v. *Guardner*, 16 M. & W. 595.

For arresting the plaintiff on a ca. sa. endorsed to levy more than was due: Wentworth v. *Bullen*, 9 B. & C. 840; *Saxon* v. *Castle*, 6 A. & E. 652; *Churchill* v. *Siggers*, 3 E. & B. 929; *Jenings* v. *Florence*, 26 L. J. C. P. 277; 2 C. B. N. S. 467; *Gilding* v. *Eyre*, 31 L. J. C. P. 174 (*b*).

Against overseers for maliciously obtaining a warrant to arrest the plaintiff for poor rates: Philips v. *Naylor*, 27 L. J. Ex. 222; 28 L. J. Ex. 225; 3 H. & N. 14.

Count for maliciously and without probable cause issuing a writ of extent under which the plaintiff's goods were seized: Craig v. *Hasell*, 4 Q. B. 481.

(*a*) An action will not lie for an arrest on final process upon a subsisting unsatisfied judgment (*Blanchenay* v. *Burt*, 4 Q. B. 707); but if the party arrested can get the judgment set aside for irregularity or on any other ground, or can show that the judgment was satisfied by payment or otherwise before the arrest, he may then maintain an action: the arrest in such case would in general support an action of trespass; see *post*, "*Trespass*," p. 354.

A person privileged from arrest on the ground that he is attending a court of justice as a witness, or on any similar ground, if arrested, cannot maintain an action, although the arrest was made maliciously and with knowledge of the privilege: for the privilege is that of the court granting it, and not that of the person, and it is discretionary in the court to allow the privilege even if claimed by the plaintiff. (*Magnay* v. *Burt*, 5 Q. B. 381; *Yearsley* v. *Heane*, 14 M. & W. 322; *Philips* v. *Naylor*, 27 L. J. Ex. 222; 3 H. & N. 14; 28 L. J. Ex. 225; 4 H. & N. 565; see *post*, "*Sheriff*," p. 341.)

(*b*) In this action it is not necessary for the plaintiff to aver or to prove that he has obtained his discharge by an order of the court or a judge, as the proceedings are terminated before the execution, and the illegality depends only on the amount due, which is a question for the jury. (*Gilding* v. *Eyre*, 31 L. J. C. P. 174.)

Special damage beyond the mere arrest must be alleged and proved in order to maintain the action, as that by reason of the arrest for the larger sum the imprisonment was prolonged or the expense of obtaining a discharge was increased. (*Churchill* v. *Siggers*, 3 E. & B. 929; *Jenings* v. *Florence*, 26 L. J. C. P. 277; 2 C. B. N. S. 467.)

For issuing a writ of fi. fa. on a warrant of attorney for a larger sum than was really due: Gough v. *Cribb*, 11 M. & W. 497.

For falsely and maliciously opposing a grant of letters-patent: Haddan v. *Lott*, 15 C. B. 411 [*held not to lie because the damage is too remote*].

For Maliciously Filing a Petition for Adjudication in Bankruptcy under the Bankrupt Law Consolidation Act, 1849.

That the defendant falsely and maliciously and without reasonable or probable cause filed a petition for adjudication in bankruptcy against the plaintiff according to the provisions of the Bankrupt Law Consolidation Act, 1849, and caused and procured the plaintiff to be adjudicated a bankrupt, and his goods and effects to be seized and taken from him; and the plaintiff disputed the said adjudication, and such proceedings were thereupon had that afterwards the commissioner authorized to act in the said petition and adjudication, and having competent authority in that behalf, ordered that the said adjudication should be annulled, and the same was then annulled accordingly [and the said order was afterwards confirmed by the Lords Justices of the Court of Appeal in Chancery sitting in bankruptcy on appeal against the same by the defendant, and the petition of the defendant on the said appeal was dismissed by the said Lords Justices], and the proceedings on the said [*or* first mentioned] petition were determined; and by reason of the premises the plaintiff was put to inconvenience and anxiety, and was prevented from transacting his business, and was injured in his credit, and incurred expense in procuring the said adjudication to be annulled [and in opposing the defendant's said petition to the Lords Justices].

A like count: Farley v. *Banks*, 4 E. & B. 493.

Like counts under the former Bankruptcy Acts: Whitworth v. *Hall*, 2 B. & Ad. 695; *Hay* v. *Weakley*, 5 C. & P. 361; *Atkinson* v. *Raleigh*, 3 Q. B. 79.

Count for filing a judge's order for debt and costs in the Bankruptcy Court under 137th sect. of the Bankrupt Law Consolidation Act, 1849, *after payment of the same: Dimmock* v. *Bowley*, 26 L. J. C. P. 231; 2 C. B. N. S. 42.

Count for a Malicious Prosecution on a Charge of Felony (*a*).

That the defendant falsely and maliciously and without reasonable or probable cause appeared before a justice of the peace, and charged [*or* caused and procured one *G. H.* to appear before a justice of the peace and charge] the plaintiff with having [feloniously stolen certain goods] and upon such charge procured the said justice to grant

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(*a*) The defendant is liable for maliciously and without reasonable or probable cause procuring the prosecution of a criminal charge against the plaintiff, notwithstanding he has also procured himself to be bound over by recognizance to prosecute. (*Dubois* v. *Keats*, 11 A. & E. 329.) Where the defendant gave false evidence as a witness in a previous action, whereupon the presiding judge, at his own instance, ordered the prosecution for perjury of the plaintiff who was another witness in that action, and bound over

his warrant for apprehending the plaintiff and bringing him before the said justice to be dealt with according to law, and under and by virtue of the said warrant caused the plaintiff to be arrested and to be imprisoned for a long time, and afterwards to be brought in custody before the said justice [*if a remand be charged* (*a*) *add:* and then procured the said justice to remand the plaintiff to prison, and caused the plaintiff to be imprisoned for another long time, and afterwards to be again brought in custody before the said justice], and the said justice having heard the said charge dismissed the same, and discharged the plaintiff out of custody, whereby the said prosecution was determined; and by reason of the premises the plaintiff has been injured in his reputation, and suffered pain of body and mind, and was prevented from attending to his business, and incurred expense in defending himself from the said charge, and in obtaining his release from the said imprisonment.

Like counts: Weston v. *Beeman*, 27 L. J. Ex. 57; *Huntley* v. *Simson*, 27 L. J. Ex. 135; 2 H. & N. 600; *Dubois* v. *Keats*, 11 A. & E. 329.

Like count against a corporation: Stevens v. *Midland Co. Ry. Co.*, 10 Exch. 352. *See* "*Corporations*," *ante*, p. 260.

Count for a malicious prosecution on a charge of perjury: Ellis v. *Abrahams*, 8 Q. B. 709; *Delisser* v. *Towne*, 1 Q. B. 333; *Fitzjohn* v. *Mackinder*, 8 C. B. N. S. 78; 29 L. J. C. P. 167.

For a malicious prosecution for an assault: Byne v. *Moore*, 5 Taunt. 187.

For procuring the plaintiff to be apprehended under a magistrate's warrant upon a charge of uttering menaces: Venafra v. *Johnson*, 10 Bing. 301.

For maliciously swearing the peace against the plaintiff: Steward v. *Gromett*, 7 C. B. N. S. 191.

For maliciously procuring a warrant to search the plaintiff's house, and searching it upon a charge of his having stolen goods: Hensworth v. *Fowkes*, 4 B. & Ad. 449.

For maliciously procuring a conviction before magistrates for poaching: Mellor v. *Baddeley*, 2 C. & M. 675.

For maliciously procuring a charge to be made before a magistrate: Delegal v. *Highley*, 3 Bing. N. C. 950.

For maliciously procuring a search warrant for stolen goods under which the plaintiff was apprehended: Wyatt v. *White*, 5 H. & N. 371; 29 L. J. Ex. 193.

For maliciously prosecuting before a court-martial (held not to form a cause of action): Sutton v. *Johnstone*, 1 T. R. 493.

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the defendant to prosecute, and the defendant appeared to prosecute, and repeated his false evidence before the grand jury, it was held that he was liable in an action for maliciously, and without reasonable or probable cause, causing the plaintiff to be prosecuted for perjury (so held by a majority of one in the Exchequer Chamber. *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; reversing the judgment of a majority of one in the court below; S. C. 8 C. B. N. S. 78; 30 L. J. C. P. 257).

(*a*) A remand is the act of the magistrate, and may be sued for in an action for malicious prosecution. It cannot, even in an action for false imprisonment, be charged as the act of the defendant. (See *Lock* v. *Ashton*, 12 Q. B. 871.)

Count against justices of the peace for acts done within their jurisdiction maliciously and without reasonable and probable cause: see "Justices of the Peace," ante, p. 300.

MANDAMUS (*a*).

Claim for a Mandamus against a Joint Stock Company to Register the Plaintiff as a Shareholder.

[*See the form of commencement, ante, p.* 21.]—That the defendants are a joint stock company incorporated under the Joint Stock Compa-

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(*a*) *Claim of a writ of mandamus under the C. L. P. Act,* 1854.]—By s. 68 of the above Act, "the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested."

By s. 69, "the declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected."

By s. 70, "the pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages."

By s. 71, "in case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced."

By s. 73, "the writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment."

By the C. L. B. Act, 1860, s. 32, the writ of mandamus shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving the writ. As to enforcing the writ against corporations, see s. 33.

A claim for a writ of mandamus will not lie for the specific performance of a mere personal contract, as to accept a lease under an agreement. (*Benson* v. *Paul,* 25 L. J. Q. B. 274; 6 E. & B. 273.)

It will lie against a chartered company at the suit of a person entitled to shares to compel the company to register him as a shareholder. (*Norris* v. *Irish Land Company,* 27 L. J. Q. B. 115; 8 E. & B. 512.)

No statute limits the time for claiming a mandamus under the C. L. P. Act, 1854. (*Ward* v. *Lowndes,* 29 L. J. Q. B. 40.)

As to the forms and proceedings in the action for a mandamus, see Chit. Forms, 9th ed. 624; 2 Chit. Pr. 11th ed. 1100.

nies Acts, 1856, 1857, and the plaintiff subscribed the memorandum of association of the said company for —— shares in the said company, and took and became proprietor of the said shares [*or* became and was the transferree and proprietor of —— shares in the said company], and was and is entitled to be entered by the defendants in the register of shareholders of the said company as a shareholder in respect of the said shares, according to the provisions of the said statutes in that behalf, and it was and is the duty of the defendants to enter the plaintiff in the said register of shareholders as a shareholder in respect of the said shares, according to the provisions of the said statute in that behalf, and the plaintiff was and is personally interested in being so entered as aforesaid, and sustains and may sustain damage by the non-performance by the defendants of their said duty to enter him as aforesaid; and performance of the said duty by the defendants has been demanded by the plaintiff of the defendants, and the defendants have refused and neglected to perform the same; and all conditions have been fulfilled, and all things have happened, and all times have elapsed, necessary to entitle the plaintiff to the performance of the said duty by the defendants, and to claim a writ of mandamus in that behalf; and the plaintiff claims a writ of mandamus commanding the defendants to enter the plaintiff in the register of shareholders of the said company as a shareholder in respect of the said shares.

A like count: Copeland v. *North-Eastern Ry. Co.*, 6 E. & B. 277.

Indorsement of writ claiming a mandamus to enter a transfer of stock, to register the plaintiff as proprietor thereof, and to deliver a certificate of his being such proprietor: Ward v. *South-Eastern Ry. Co.*, 29 L. J. Q. B. 177.

Claim of a Writ of Mandamus following a Count for the same Cause of Action.

And for that [*here set forth the grounds upon which the claim is founded, which may be done in some cases by reference to the allegations in the preceding count, taking care that it appears sufficiently set forth that the plaintiff is personally interested in the duty claimed to be fulfilled, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him and refused or neglected, and conclude:*] and the plaintiff claims a writ of mandamus commanding the defendant that [*here state the duty claimed to be fulfilled*].

Against a company by the administrator of a deceased shareholder to compel the company to register him as the proprietor of the shares: Norris v. *Irish Land Co.*, 27 L. J. Q. B. 115; 8 E. & B. 512.

Claim of a writ of mandamus, commanding the clerk to a local board of health to levy a rate for the payment of a debt due to the plaintiff: Ward v. *Lowndes*, 28 L. J. Q. B. 265.

Market.

For Disturbing the Plaintiff's Market.

(*Venue local.*) That the plaintiff was possessed of a market for the sale of goods, wares, and merchandise, holden in the town of ——, in the county of ——, on [Saturday] in every week, together with tolls, stallage, and other profits to the said market appertaining; and the defendant disturbed the plaintiff's said market and prevented his enjoyment thereof, and of the said tolls, stallages, and other profits, by unlawfully holding a new market for the sale of divers goods, wares, and merchandise in the said town near to the place where the said market of the plaintiff was holden as aforesaid; whereby the plaintiff lost the tolls, stallages, and other profits of his said market.

For disturbing the plaintiff's market by selling goods near the market: Bridgland v. *Shapter*, 5 M. & W. 375.

For disturbing the plaintiff's market by selling goods in private shops on market days: Mayor of Devizes v. *Clark*, 5 A. & E. 506; *Mosley* v. *Walker*, 7 B. & C. 40; *Mayor of Macclesfield* v. *Pedley*, 4 B. & Ad. 397; *Mayor of Macclesfield* v. *Chapman*, 12 M. & W. 18.

Master and Servant.

Count for Enticing away the Plaintiff's Servant (*a*).

That *G. H.* was and still is the servant of the plaintiff in his business of a ——, and the defendant, well knowing the same, wrongfully enticed and procured the said *G. H.* unlawfully and without the consent and against the will of the plaintiff to depart from the said service of the plaintiff; whereby the plaintiff has lost the services of the said *G. H.* in his said business.

A like count: Hartley v. *Cummings*, 5 C. B. 247.

Count for enticing away the plaintiff's apprentice: Cox v. *Munsey*, 6 C. B. N. S. 375.

Count for Receiving and Harbouring the Plaintiff's Servant.

That *G. H.* was and still is the servant of the plaintiff in his business of a ——, and unlawfully and without the consent and against

(*a*) In order to maintain this action there must be a valid contract of service, or an actual subsisting service in fact (*Sykes* v. *Dixon*, 9 A. & E. 693; *Hartley* v. *Cummings*, 5 C. B. 247), to the knowledge of the defendant (*Fores* v. *Wilson*, Peake, 55), and an actual loss of service by the act of the defendant. (See *Eager* v. *Grimwood*, 1 Ex. 61.) An action will not lie for enticing away an apprentice if the indentures of apprenticeship are void. (*Cox* v. *Muncey*, 6 C. B. N. S. 375.) Where the defendant has enticed away the plaintiff's apprentice, or has kept him after notice, the plaintiff may waive the tort and sue as upon a contract for the value of his services. (See an indebitatus count on this cause of action, *Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 191.)

the will of the plaintiff departed from the service of the plaintiff, and the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff, received, harboured, and detained the said *G. H.*, and refused to deliver the said *G. H.* to the plaintiff, although requested by the plaintiff so to do; whereby the plaintiff lost the service of the said *G. H.*, in his said business.

Like counts: Blake v. *Lanyon*, 6 T. R. 221; *Forbes* v. *Cochrane*, 2 B. & C. 448; *Sykes* v. *Dixon*, 9 A. & E. 693.

Count for enticing and procuring a singer engaged to perform at the plaintiff's theatre to break her engagement: Lumley v. *Gye*, 2 E. & B. 216.

For the loss of Services occasioned by the Seduction of the Plaintiff's Servant (a).

That the defendant debauched and carnally knew *G. H.*, then being the [daughter and] servant of the plaintiff, whereby the said *G. H.* became pregnant with child; and the plaintiff lost the services of the said *G. H.* for a long time, and incurred expense in nursing and taking care of her and about the delivery of the said child.

Like counts: Davies v. *Williams*, 10 Q. B. 725; *Eager* v. *Grimwood*, 1 Ex. 61; *Grinnell* v. *Wells*, 7 M. & G. 1033; *Griffiths* v. *Teetgen*, 15 C. B. 344; *Thompson* v. *Ross*, 29 L. J. Ex. 1.

(*a*) In order to maintain an action for seduction the relation of master and servant must subsist at the time of the seduction (see preceding note; *Davies* v. *Williams*, 10 Q. B. 725). Where the relation is contracted after the seduction the action is not maintainable. (*Ib.*)

A father can maintain an action for the seduction of his daughter only in respect of his loss of his daughter's services occasioned by the seduction, and not in respect of his being compelled to maintain her by reason of the seduction. (*Grinnell* v. *Wells*, 7 M. & G. 1033.) The loss of service must be alleged in the declaration, and proved. (*Ib.*, 1041.) As to the kind of service required to support the action, see *Thompson* v. *Ross*, 5 H. & N. 16; 29 L. J. Ex. 1; *Manley* v. *Field*, 7 C. B. N. S. 96; 29 L. J. C. P. 79.

The loss of service must be occasioned by the act of the defendant; where the jury found that the defendant seduced the plaintiff's daughter, but was not the father of the child whose birth occasioned the loss of service, the defendant was held entitled to a verdict. (*Eager* v. *Grimwood*, 1 Ex. 61.)

The plea of the general issue, not guilty, to the above form does not put in issue that *G. H.* was the servant or daughter of the plaintiff, which must be denied by a distinct traverse. (*Torrence* v. *Gibbins*, 5 Q. B. 297.) But where the form of allegation used is "that the defendant debauched and carnally knew the plaintiff's daughter and servant," without naming the person, or identifying her otherwise than by relation, as in the form given for criminal conversation in the C. L. P. Act, 1852, sched. B. 27, the plea of the general issue would seem necessarily to deny also the service or relationship. (See *post*, c. 6, "*General Issue.*")

The county court has no jurisdiction in actions for seduction. (9 & 10 Vict. c. 95, s. 58.)

For loss of service arising from the plaintiff's servant being bitten by the defendant's dog: Hodsoll v. *Stallebrass*, 11 A. & E. 301.

For an injury done to the plaintiff's servant by driving a carriage against him: Martinez v. *Gerber*, 3 M. & G. 88.

For assaulting and beating the plaintiff's son and servant: Newton v. *Holford*, 6 Q. B. 921; *Gilbert* v. *Schwenck*, 14 M. & W. 488.

For shooting the plaintiff's son and servant: Dixon v. *Bell*, 5 M. & S. 198.

For an injury to the plaintiff's son and servant by driving a carriage against him: Williams v. *Holland*, 10 Bing. 112; *Hall* v. *Hollander*, 4 B. & C. 660.

Against the Master for Injuries occasioned by the Negligent Driving of his Servant (*a*).

That the defendant, by *G. H.* his servant, so negligently and unskilfully managed and drove a horse and cart along a public highway that the said horse and cart were forced and driven against the plaintiff; whereby the plaintiff was thrown down and wounded, and for a long time was sick and disordered, and was prevented from at-

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(*a*) The master is, in general, liable for the negligence of his servant in the course of his employment (*Patten* v. *Rea*, 26 L. J. C. P. 235), but not for wrongful acts done by the servant wilfully and intentionally (*Savignac* v. *Roome*, 6 T. R. 125; *McManus* v. *Cricketi*, 1 East, 106; *Croft* v. *Alison*, 4 B. & Ald. 590; *Seymour* v. *Greenwood*, 6 H. & N. 359; 30 L. J. Ex. 189, 327); nor for acts done by the servant beyond the scope of his employment or authority. (*Mitchell* v. *Crassweller*, 13 C. B. 237; and see *Coleman* v. *Riches*, 16 C. B. 104.) The master is not in general liable for the negligence of persons employed by the servant to do his work, between whom and the master the relation of master and servant does not exist. (*Milligan* v. *Wedge*, 12 A. & E. 737; *Rapson* v. *Cubitt*, 9 M. & W. 710.)

Where a person contracts with another for the performance of certain work, the work being proper to be done and the contractor a proper person to do it, he is not in general liable for injuries caused by the negligence of the contractor or of the servants employed by the contractor in the performance of the work (*Reedie* v. *London and North-Western Ry. Co.*, 4 Ex. 244; *Peachey* v. *Rowland*, 13 C. B. 182; *Steel* v. *South-Eastern Ry. Co.*, 16 C. B. 550; *Allen* v. *Hayward*, 7 Q. B. 960; *Butler* v. *Hunter*, 31 L. J. Ex. 214); but he is liable where the work contracted for causes the injury. (*Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767; *Hole* v. *Sittingbourne Ry. Co.*, 6 H. & N. 488; 30 L. J. Ex. 81.) And he may be liable where he retains a control over the contractor, or personally interferes with the work. (*Burgess* v. *Gray*, 1 C. B. 578.) And where the contractor is entrusted with the performance of a duty incumbent upon his employer, and performs it negligently, the employer is liable. (*Pickard* v. *Smith*, 10 C. B. N. S. 470.)

Where the act of the servant complained of was specifically ordered by the master, or necessarily followed upon or was comprised in his specific order, it may be charged in the declaration as the immediate act of the master. (*Savignac* v. *Roome*, 6 T. R. 125; *Gregory* v. *Piper*, 9 B. & C. 591.) Where the act complained of is an independent act of the servant not specifically ordered, although one for which the master may be liable, it cannot be charged as the immediate act of the master. (*Gordon* v. *Rolt*, 4 Ex. 365; *Sharrod* v. *London and North-Western Ry. Co.*, 4 Ex. 580.) In the latter case, the liability of the master will depend upon whether the act of the servant was done in the course of his employment or not, as explained above.

tending to his affairs, and is permanently disabled, and incurred expense for medical attendance.

Like counts: Croft v. *Alison*, 4 B. & Ald. 590; *Moreton* v. *Hardern*, 4 B. & C. 223; *Davies* v. *Mann*, 10 M. & W. 546; *Mitchell* v. *Crasweller*, 22 L. J. C. P. 100; 13 C. B. 237; *Patten* v. *Rea*, 26 L. J. C. P. 235; 2 C. B. N. S. 606.

Count against the hirer of a driver and horses for an injury caused by the negligence of the driver: Laugher v. *Pointer*, 5 B. & C. 547; *Quarman* v. *Burnett*, 6 M. & W. 499 [*where the hirer was held not to be liable*]; *M'Laughlin* v. *Pryor*, 4 M. & G. 48 [*where the hirer was held to have made himself liable by personal interference*].

Count against an omnibus proprietor for injuries caused by the negligence of his driver: Cotton v. *Wood*, 29 L. J. C. P. 333.

Count against the owner of a public conveyance for want of care in his servant in removing the plaintiff from the conveyance for misconduct: Seymour v. *Greenwood*, 30 L. J. Ex. 189.

Against the master for an injury done by a servant in the course of the work which he was employed to do: Scott v. *Mayor of Manchester*, 26 L. J. Ex. 132, 406; 1 H. & N. 59.

By a Servant against his Master for employing him to Work upon an unsafe Scaffolding (a).

That the plaintiff was employed by the defendant [as a bricklayer]

(*a*) A master is not in general liable to an action at the suit of a servant for an injury arising from the negligence of a fellow-servant in the course of their common employment. (*Priestley* v. *Fowler*, 3 M. & W. 1; *Hutchinson* v. *York and Berwick Ry. Co.*, 5 Ex. 343; *Wiggett* v. *Fox*, 25 L. J. Ex. 188; 11 Ex. 832; *Degg* v. *Midland Ry. Co.*, 26 L. J. Ex. 171; 1 H. & N. 773; *Vose* v. *Lancashire and Yorkshire Ry. Co.*, 27 L. J. Ex. 249; 2 H. & N. 728; *Griffiths* v. *Gidlow*, 27 L. J. Ex. 404; 3 H. & N. 648; *Searle* v. *Lindsay*, 31 L. J. C. P. 106.) In an ordinary contract of service there is no implied promise, on the part of the master, not to expose the servant to extraordinary risk in the course of the employment. (*Riley* v. *Baxendale*, 6 H. & N. 445; 30 L. J. Ex. 87.) Nor is the master liable to an action at the suit of a servant for an injury incurred in the service consequent upon the insufficient number of servants employed. (*Skipp* v. *Eastern Counties Ry. Co.*, 9 Ex. 223.) A person who volunteers to assist a servant in his work is in the same position as a servant in respect of the liability of the master for the acts of the other servants. (*Degg* v. *Midland Ry. Co.*, 26 L. J. Ex. 171; 1 H. & N. 773; *Potter* v. *Faulkner*, 31 L. J. Q. B. 30; *and see Abraham* v. *Reynolds*, 5 H. & N. 143.)

But an action will lie at the suit of a servant against his master for knowingly providing bad materials or instruments for the work, unless the servant undertakes the work with a knowledge of the state of the materials or instruments. (*See the cases above.*) It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when, in fact, the master knows or ought to know that it is not so; and if from any negligence in this respect damage arise to the servant the master is responsible. (Per L. Cranworth, C., *Pa-*

to do certain work for the defendant upon a certain scaffolding constructed by the defendant for that purpose, which said scaffolding was, by the negligence and default of the defendant, constructed unsafely and with defective and improper materials, and was in an unsafe condition and unfit for the purpose aforesaid, which the defendant well knew, but of which the plaintiff was ignorant; and by reason of the premises, whilst the plaintiff was so employed [as such bricklayer] as aforesaid doing the said work upon the said scaffolding, the said scaffolding broke and gave way, and thereby the plaintiff was thrown to the ground, and his leg was broken, and he was permanently injured and rendered unfit for work, and incurred expense for medical attendance.

Like counts: Tarrant v. *Webb*, 18 C. B. 797; 25 L. J. C. P. 261; *Roberts* v. *Smith*, 2 H. & N. 213; 26 L. J. Ex. 319.

Like count for providing an unsafe ladder for the servant's use: Williams v. *Clough*, 27 L. J. Ex. 325; 3 H. & N. 258.

Like count for employing the servant to work in a mine with a dangerous shaft: Mellors v. *Shaw*, 30 L. J. Q. B. 333; 1 B. & S. 437.

Like count for negligently keeping the machinery at the mouth of a mine in a dangerous state: Griffiths v. *Gidlow*, 27 L. J. Ex. 404; 3 H. & N. 648; *Senior* v. *Ward*, 28 L. J. Q. B. 139; El. & El. 385; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183.

Count by servant against master for not fencing machinery: post, "*Negligence*," 322.

Medical Men.

Counts against medical men for negligence and unskilfulness in the treatment of a patient: Slater v. *Baker*, 2 Wils. 359; *Seare* v. *Prentice*, 8 East, 348; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Hancke* v. *Hooper*, 7 C. & P. 81; *Lanphier* v. *Phipos*, 8 C. & P. 476.

Mesne Profits.

See *post*, "*Trespass to Land*," p. 361.

Mines.

Count for a trespass in breaking and entering the plaintiff's coal mine, and taking his coals: Morgan v. *Powell*, 3 Q. B. 278; *Brain* v. *Harris*, 10 Ex. 908.

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terson v. *Wallace*, 1 Macq. H. L. C. 748; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. C. 266, 288; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183; *Mellors* v. *Shaw*, 30 L. J. Q. B. 333; 1 B. & S. 437.) So also an action will lie at the suit of a servant against the master for negligently employing an incompetent fellow-servant, through whose incompetence the plaintiff is injured, although there is no general implied warranty by the master of the competency of his workmen. (*Tarrant* v. *Webb*, 18 C. B. 797; 25 L. J. C. P. 261.)

Counts for working a mine under or near to the plaintiff's land, whereby it lost its natural or acquired right to support, and sank: see "*Support*," *post*, p. 350.

By the owner of a mine against the owner of an adjacent mine for removing barriers of coal, whereby water flowed into the plaintiff's mine and prevented him from working it (*a*): *Firmstone* v. *Wheeley*, 2 D. & L. 203; *Shaw* v. *Stenton*, 27 L. J. Ex. 253; 2 H. & N. 858.

Against the owner of a mine for not properly fencing a shaft in the plaintiff's close, whereby the plaintiff's horse fell in and was killed: Sybray v. *White*, 1 M. & W. 435.

Mischievous Animals (*b*).

For knowingly keeping a fierce Dog which injured the Plaintiff.

That the defendant wrongfully kept a dog of a fierce and mischievous nature, well knowing that the said dog was of a fierce and mischievous nature, and the said dog, whilst the defendant so kept the same, attacked and bit the plaintiff; whereby the plaintiff was wounded and so remained for a long time, and was prevented from carrying on his business, and incurred expense for medical attendance.

Like counts for knowingly keeping mischievous animals: a ram, Jackson v. *Smithson*, 15 M. & W. 563; *a monkey, May* v. *Burdett*, 9 Q. B. 101.

Counts for knowingly keeping fierce dogs, which worried the plain-

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(*a*) Where the defendant wrongfully dug into the adjacent mine of the plaintiff and left apertures through which water passed and damaged the plaintiff's mine, it was held that the defendant was liable for the trespass, but could not be sued for omitting to close up the apertures. (*Clegg* v. *Dearden*, 12 Q. B. 576.)

(*b*) An action lies against one who keeps a mischievous animal, knowing it to be mischievous, in respect of any damage done by the animal to the plaintiff. (4 Co. 18, b; *Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 C. B. 622.) It is sufficient to aver generally the fierce and mischievous nature of the animal, and such an averment may be proved by acts of ferocity of a different character from that charged in the particular case (see *Hartley* v. *Harriman*, 1 B. & Ald. 620); thus, proof of the defendant's dog having bitten a child, was held to be evidence in support of an allegation that the dog was of a fierce and mischievous nature in an action for the loss of sheep destroyed by the dog. (*Gettring* v. *Morgan*, 5 W. R. 536; 29 L. T. 106; and see *Jenkins* v. *Turner*, L. Raym. 109.) A specific averment that the defendant's dog was accustomed to bite sheep, is not supported by proof that the dog was of a fierce and mischievous nature, and accustomed to bite men. (*Hartley* v. *Harriman*, 1 B. & Ald. 620.)

The negligence of the defendant in keeping the animal insecurely is no part of the cause of action, and need not be stated in the declaration. The wrongful act consists in keeping the dangerous animal after knowledge of its propensities. (*May* v. *Burdett*, 9 Q. B. 101.) If the injury was in fact caused by the defendant's negligence, the defendant may be so charged independently of his knowledge of the mischievous propensities of the animal. See *post*, "*Negligence*."

tiff's sheep and cattle: Hartley v. *Harriman*, 1 B. & Ald. 620; *Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 C. B. 622.

For knowingly keeping a fierce dog, which injured the plaintiff's apprentice: Hodsoll v. *Stallebrass*, 11 A. & E. 301.

For knowingly driving a vicious and unmanageable horse, which ran against the plaintiff's carriage: Martinez v. *Gerber*, 3 M. & G. 88.

For driving a bull in a public street knowing it to be prone to run at anything red, whereby it injured the plaintiff, who was dressed in red: Hudson v. Roberts, 6 Ex. 697.

Count for knowingly selling by public auction a glandered horse, which infected the horses of the plaintiff, who purchased it believing it to be sound: Hill v. *Balls*, 27 L. J. Ex. 45; 2 H. & N. 299. [*Held bad on demurrer, the sale not being shown to have been illegal, and no warranty or fraud being alleged, and the damage being too remote.*]

Negligence (*a*).

(*a*) *Negligence.*]—An action lies for the omission or negligent performance of any duty of the defendant whereby the plaintiff has sustained damage. The negligence, in respect of the duty, which is actionable, has been described as being the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do. (Per *Alderson*, B., *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784; 25 L. J. Ex. 212.) If such negligence causes damage to another an action will lie in respect of the damage so caused.

The omission to guard against extraordinary accidents is not negligence; thus, a water company whose pipes were constructed with reasonable care with reference to ordinary frosts was held not to be liable for the breaking of the pipes by an extraordinary frost. (*Blyth* v. *Birmingham Waterworks Co.*, *supra.*)

The mere happening of an accident through the instrumentality of the defendant is not *primâ facie* evidence of negligence, but the plaintiff must show affirmative evidence of negligence on the part of the defendant. (*Cotton* v. *Wood*, 8 C. B. N. S. 568; 29 L. J. C. P. 333; *Hammack* v. *White*, 31 L. J. C. P. 129.) Thus, the mere fact of the defendant's omnibus running over the plaintiff while crossing the road is not evidence of negligence against the defendant (*Cotton* v. *Wood*, *supra*); and where the defendant rode a horse in the public street, which he had just bought, and of which he had no experience, and which became unmanageable and knocked down the plaintiff, it was held that these facts afforded no evidence of negligence. (*Hammack* v. *White*, 31 L. J. C. P. 129.) Railway companies are not liable for accidental fires occasioned by their engines, if they have taken all possible precautions to avoid them, and are not guilty of some negligence in fact. (*Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679; 29 L. J. Ex. 247; and see *Freemantle* v. *London and North-Western Ry. Co.*, 10 C. B. N. S. 89; 31 L. J. C. P. 12.) Where two trains, both belonging to the same company, came into collision upon their railway, it was held that this alone showed a *primâ facie* case of negligence (*Skinner* v. *London and Brighton Railway Co.*, 5 Ex. 787); and so it has been held where an accident occurred to a train on a railway while the train and the railway were under the exclusive management of the defendants. (*Carpue* v. *London and Brighton Railway Co.*, 5 Q. B. 747.) The mere fact of the

For Injuries done by the Negligent Driving of the Defendant (a).

That the defendant so negligently and unskilfully drove and managed a horse and carriage in a public highway, that the same were forced and driven against a horse and carriage of the plaintiff; whereby the said horse of the plaintiff was thrown down and wounded, and his said carriage was broken and damaged, and the plaintiff incurred expense in curing the said horse and in repairing the said carriage, and was deprived of the use thereof for a long time, and was delayed and injured in his business.

Like counts.: Williams v. *Holland*, 10 Bing. 112; *Wheatley* v. *Patrick*, 2 M. & W. 650; *Gough* v. *Bryan*, 2 M. & W. 770; *Taverner* v. *Little*, 5 Bing. N. C. 678; *Hart* v. *Crowley*, 12 A. & E. 378.

For injuries caused by the negligent driving of the defendant's servant, ante, "*Master and Servant,*" *p.* 313.

For Negligent Driving where the Damage occurred in endeavouring to avoid a Collision.

That at the time of the committing of the grievances hereinafter mentioned the plaintiff was possessed of a carriage and horses, and was driving the same along a public highway, and the defendant then so negligently and violently drove a waggon and horses along the same highway, and so unskilfully and improperly conducted the said waggon and horses that the same would then necessarily and inevi-

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defendant driving or riding on the wrong side of the road at the time of the accident happening is said to be no evidence of negligence. (See *Lloyd* v. *Ogleby*, 5 C. B. N. S. 667; *North* v. *Smith*, 10 C. B. N. S. 572, 575.)

A declaration merely alleging that the defendant acted "negligently" does not alone show a cause of action, unless it is also shown, or can be inferred from the facts alleged, that the negligence amounts to a breach of duty. (*Dutton* v. *Powles*, 31 L. J. Q. B. 191, 192.) Therefore, where the cause of action is founded on contract, or arises out of a relationship created by bailment or retainer, it is necessary to show expressly the creation of the duty alleged to have been broken; but where it arises independently of contract, the mere statement of the facts must show that the defendant was bound not to do or to do what he is alleged to have negligently committed or omitted. An express allegation of duty on the part of the defendant is a mere inference of law, and is immaterial and cannot be traversed. If the facts stated do not raise the duty, the express allegation will not supply the defect; and if the facts sufficiently show the duty, the express allegation is unnecessary: it ought not therefore to be introduced. (*Cane* v. *Chapman*, 5 A. & E. 647; *Seymour* v. *Maddox*, 16 Q. B. 326; and see *ante*, p. 102.)

(*a*) The plaintiff may charge the injury resulting from the negligent driving of the defendant himself as a trespass, see *post*, "*Trespass*," or he may charge it as the consequence of the defendant's negligence, notwithstanding the act is immediate, so long as it is not a wilful act. (*Day* v. *Edwards*, 5 T. R. 648; *Ogle* v. *Barnes*, 8 T. R. 188; *Savignac* v. *Roome*, 6 T. R. 125; *Williams* v. *Holland*, 10 Bing. 112, 117; and see *Covell* v. *Laming*, 1 Camp. 497; *Turner* v. *Hawkins*, 1 B. & P. 472; *Moreton* v. *Hardern*, 4 B. & C. 223; *Wells* v. *Ody*, 1 M. & W. 452, 462. The act of the defendant's servant cannot be charged as the immediate act of the defendant, unless he specifically authorized it. See *ante*, p. 313.

tably have been driven and forced against the said carriage and horses of the plaintiff and have damaged them, if the said carriage and horses of the plaintiff had then continued and remained upon the said highway as aforesaid; wherefore the plaintiff, in a reasonable and necessary endeavour under the circumstances to avoid the said damage, reasonably and necessarily and with proper and reasonable care and skill in that behalf guided and conducted his said carriage and horses to and off one side of the said highway, and in so doing his said carriage and horses, without any negligence, unskilfulness, or default of the plaintiff, but solely and immediately in consequence of the negligence, violence, and improper conduct of the defendant as aforesaid, were upset and injured; whereby the plaintiff was put to expense in repairing his said carriage, and in curing his said horses, and was deprived of the use of his said carriage and horses for a long time, and was put to expense in hiring another carriage and other horses.

For negligence in driving a coach, whereby the plaintiff, a passenger, was obliged to jump off to avoid danger, and sustained damage in so doing: Jones v. *Boyce*, 1 Starkie, 493 [*where see the observations of Lord Ellenborough upon this cause of action, which are also applicable to the preceding count.*]

For an injury arising from the negligence of the defendant in leaving his horses unattended: Quarman v. *Burnett*, 6 M. & W. 499.

For leaving a horse and cart unattended, whereby the plaintiff, an infant, was injured while playing with them: Lynch v. *Nurdin*, 1 Q. B. 29.

For spurring a horse while passing close to the plaintiff on a highway, whereby the plaintiff was kicked by the horse: North v. *Smith*, 10 C. B. N. S. 572.

For Negligence in Navigating a Ship, whereby it ran foul of the Plaintiff's Ship (a).

That the defendant so negligently and unskilfully navigated and directed a steam-ship [in the river Thames], that the said steam-ship ran foul of and struck against a ship of the plaintiff; whereby the said ship of the plaintiff was swamped and sank, and divers goods of the plaintiff then being in the said ship were wetted and spoiled, and the plaintiff incurred expenses in raising the said ship, and in clearing the water therefrom, and in surveying and repairing the damage done to the same, and in preserving divers goods of the plaintiff then

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(*a*) As to this action see the Merchant Shipping Act, 17 & 18 Vict. c. 104, and the following cases decided under it:—*Smith* v. *Voss*, 26 L. J. Ex. 233; 2 H. & N. 97; *Tuff* v. *Warman*, 26 L. J. C. P. 263; 27 L. J. C. P. 322; 2 C. B. N. S. 740. By s. 388, the master or owner is not to be liable for the negligence of a qualified pilot, where the employment of such pilot is compulsory; but in order to exonerate the owner, he must show that the negligence was exclusively that of the pilot. (*Rodrigues* v. *Melhuish*, 10 Ex. 110.)

in the said ship, and the plaintiff lost the use of the said ship for a long time, and the freight and profits which he might have derived therefrom.

Like counts: Lucey v. *Ingram*, 6 M. & W. 302; *Martin* v. *Temperley*, 4 Q. B. 298; *Rodrigues* v. *Melhuish*, 10 Ex. 110; *Smith* v. *Voss*, 26 L. J. Ex. 233.

Like counts alleging the defendant's ship to have been under the management of his servants: Harris v. *Willis*, 15 C. B. 710; *Fenton* v. *Dublin S. P. Co.*, 8 A. & E. 835; *Dowell* v. *Gen. S. Nav. Co.*, 26 L. J. Q. B. 59; 5 E. & B. 195; *Morrison* v. *Gen. S. Nav. Co.*, 8 Ex. 733; *Dalyell* v. *Tyrer*, 28 L. J. Q. B. 52.

Count for negligence in navigating a steamer, whereby the plaintiff's barge was swamped by the swell of the water: Smith v. *Dobson*, 3 M. & G. 59.

Against the owners of a transport under the command of an officer of the navy, for an injury occurring in execution of orders: Hodgkinson v. *Fernie*, 26 L. J. C. P. 217.

For negligence in navigating a ship contrary to the Admiralty regulations: General Steam Navigation Co. v. *Morrison*, 13 C. B. 581.

For negligently leaving a wreck in a navigable channel for ships, without any buoy or mark, whereby the plaintiff's vessel was injured: White v. *Crisp*, 10 Ex. 312; *Brown* v. *Mallett*, 5 C. B. 599.

For negligently driving a Train against the Plaintiff.

That the defendants [by their servants] so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along a certain railway, which the plaintiff was then lawfully crossing, that the said engine and train of carriages were driven and struck against the plaintiff; whereby the plaintiff was thrown down and wounded and permanently injured, and was prevented from attending to his business for a long time and incurred expense for medical attendance.

Like counts: Waite v. *North-Eastern Ry. Co.*, 27 L. J. Q. B. 417; *Great Northern Ry. Co.* v. *Harrison*, 10 Ex. 376.

Against a Railway Company for Negligence in using and managing an Engine, whereby the Plaintiff's Buildings were burned. (*See ante, p.* 317, *n.*)

That the plaintiff was possessed of certain sheds and buildings situate near to a railway used by the defendants for the purpose of driving along the same (amongst other things) locomotive engines, and the defendants were possessed of a locomotive engine containing fire and burning matter, which was being driven along the said railway near to the said sheds and buildings, under the management of the defendants, and the defendants so negligently and unskilfully managed the said engine and the said fire and burning matter therein contained as aforesaid [and the said engine was so insufficiently and improperly constructed] that sparks from the said fire

and portions of the said burning matter escaped and flew from the said engine to and upon the said sheds and buildings; whereby the said sheds and buildings were set on fire, and the same, together with certain plant, tools, stock-in-trade, and goods of the plaintiff, then being in and near the said sheds and buildings, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same, and was prevented from carrying on his business.

Like counts: Aldridge v. *Great Western Ry. Co.*, 3 M. & G. 515; *Piggott* v. *Eastern Counties Ry. Co.*, 3 C. B. 229; *Vaughan* v. *Taff Vale Ry. Co.*, 28 L. J. Ex. 41.

Against a Railway Company for the Negligence of their Porter, who knocked the Plaintiff down with a Truck.

That the defendants by their servants so negligently and unskilfully wheeled and managed a truck upon the platform of a railway station, along which the plaintiff was then lawfully passing, that the said truck was forced and struck against the plaintiff; whereby he was thrown down and wounded and lamed and injured, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

Against a Railway Company for neglecting to Light a Station, whereby the Plaintiff, a Passenger, fell and was injured.

That at the time of the committing of the grievance hereinafter mentioned the defendants were carriers of passengers for hire from —— to ——, in carriages on a railway, and used a certain station at —— aforesaid for the reception and accommodation of their said passengers, and the said station was then in the possession and under the management of the defendants for the purposes aforesaid; yet the defendants negligently managed the said station and carriages, and placed the said carriages at inconvenient and dangerous places in the said station, and kept the said station in a dangerous state, and omitted to provide sufficient accommodation for the safe access of their passengers to the said carriages there, and to light the said station in proper places and in a sufficient manner for the use of their said passengers during the hours of darkness; whereby the plaintiff, having been received there by the defendants as and then being a passenger to be carried by them from —— to —— aforesaid, fell and was thrown down with great violence at the said station, and one of the arms of the plaintiff was broken, and he was permanently injured and suffered great pain, and was prevented from transacting his business for a long time, and incurred expense for surgical and medical attendance.

A like count: Martin v. *Great Northern Ry. Co.*, 16 C. B. 179.

Against a railway company for negligently keeping an obstruction on the platform of a station, which the plaintiff fell over: Cornman v. *Eastern Counties Ry. Co.*, 4 H. & N. 781; 29 L. J. Ex. 94.

For keeping a railway station in a dangerous state: Toomey v. *London and Brighton Ry. Co.*, 3 C. B. N. S. 146.

Against a railway company for neglecting to maintain fences: see "Fences," ante, p. 287.

For Damage done to the Plaintiff's House by the Defendant negligently pulling down the adjoining House (a).

(*Venue local.*) That the defendant so negligently and unskilfully pulled down a house next adjoining to the dwelling-house of the plaintiff, that the walls, floors and ceilings of the said dwelling-house of the plaintiff were shaken, cracked and damaged, and bricks, tiles, wood, dust and rubbish fell from the said house into and upon the said dwelling-house of the plaintiff, and broke the windows thereof and damaged the furniture and goods of the plaintiff therein; whereby the plaintiff incurred expense in repairing the said walls, floors, ceilings and windows of his said dwelling-house, and his said furniture and goods, and lost the use and enjoyment of his said dwelling-house, goods and furniture for a long time.

Like counts: Dodd v. *Holme,* 1 A. & E. 493; *Langford* v. *Woods,* 7 M. & G. 625; *Trower* v. *Chadwick,* 3 Bing. N. C. 334; *Emblen* v. *Myers,* 6 H. & N. 54; 30 L. J. Ex. 71.

A like count, with a count for injuries done to the plaintiff's house by negligently underpinning the party-wall: Bradbee v. *Christ's Hospital,* 4 M. & G. 714.

For injuries done to the plaintiff's house by negligently constructing a sewer in the neighbourhood: Jones v. *Bird,* 5 B. & Ald. 837; *Grocers' Company* v. *Donne,* 3 Bing. N. C. 34.

For negligently keeping a sewer on the defendant's land, whereby an overflow of the contents was discharged on the plaintiff's premises: Alston v. *Grant,* 3 E. & B. 128.

For negligence in not fencing machinery under the Factory Act, 7 & 8 *Vict. c.* 15 *s.* 21: *Casswell* v. *Worth,* 25 L. J. Q. B. 121; 5 E. & B. 849; *Doel* v. *Sheppard,* 25 L. J. Q. B. 124; 5 E. & B. 856; *Holmes* v. *Clarke,* 6 H. & N. 349; 30 L. J. Ex. 135.

For negligence in lending a machine with a known defect in it, in

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(a) Where the plaintiff is not entitled to a right to support for his house from the adjoining house, an action will not lie for pulling down the adjoining house without shoring up the plaintiff's. (*Peyton* v. *Mayor of London,* 9 B. & C. 725; see "*Support,*" *post,* p. 351.) But an action may be maintained for any damage caused to the plaintiff's house by pulling down the adjoining house in a negligent and improper manner, as distinct from the damage done by the removal of the support to which the plaintiff was entitled. (*Dodd* v. *Holme,* 1 A. & E. 493; *Langford* v. *Woods,* 7 M. & G. 625; *Bradbee* v. *Christ's Hospital,* 4 M. & G. 714; *Trower* v. *Chadwick,* 3 Bing. N. C. 334; 6 Bing. N. C. 1.) There is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired; the only duty is to keep it in such a state, that his neighbour may not be injured by its fall. (*Chauntler* v. *Robinson,* 4 Ex. 163.)

using which the plaintiff was injured: Blakemore v. *Bristol & Exeter Ry. Co.*, 27 L. J. Q. B. 167; 8 E. & B. 1035; *M'Carthy* v. *Young*, 30 L. J. Ex. 227; *and see* "*Bailments*," *ante*, *p.* 241. [*The borrower, and perhaps any other persons for whose use the loan of the machine was intended, can alone maintain this action, and not persons whom the borrower permits to use the machine without the privity of the lender*, ib.]

For negligence in entrusting a young girl with a loaded gun: Dixon v. *Bell*, 5 M. & S. 198.

For negligently constructing a hayrick, which took fire and burnt plaintiff's house: Vaughan v. *Menlove*, 3 Bing. N. C. 468.

By a guest against the owner of a house for negligence in keeping a door in a dangerous state, whereby the plaintiff, opening the door, was injured (held a bad count): Southcote v. *Stanley*, 25 L. J. Ex. 339; 1 H. & N. 247.

For negligently leaving a trap-door in a private passage open: Chapman v. *Rothwell*, 27 L. J. Q. B. 315.

For negligently driving an ox through the streets, which ran into the plaintiff's shop and broke his goods: Milligan v. *Wedge*, 12 A. & E. 737.

Counts against Commissioners, Trustees, etc., of Public Works for Negligence (*a*).

Against the trustees of a harbour for negligence in allowing it to become choked with mud: Metcalfe v. *Hetherington*, 11 Ex. 257; *Gibbs* v. *Trustees of Liverpool Docks*, 1 H. & N. 439; 3 H. & N. 164; 27 L. J. Ex. 321; *Thompson* v. *North-Eastern Ry. Co.*, 30 L. J. Q. B. 67; *Penhallow* v. *Mersey Docks Board*, 30 L. J. Ex. 329.

Against the trustees of a canal for keeping a dangerous bridge, whereby a person fell in and was drowned: Manley v. *St. Helen's Canal Co.*, 27 L. J. Ex. 159; 2 H. & N. 840.

Against commissioners of a canal navigation for want of repair in a lock, whereby the plaintiff's barge was delayed: Walker v. *Goe*, 27 L. J. Ex. 427; 3 H. & N. 395.

Against commissioners of sewers for negligence in constructing a sewer, whereby the plaintiff's house was injured: Jones v. *Bird*, 5

(*a*) Trustees, commissioners, and corporate bodies performing public duties gratuitously and not for their own profit, are not liable for injuries to individuals caused by their acts, where they have acted within their authority, and have exercised a sound discretion and skill in the execution of their duties. They are not liable for the consequences of their acts done in the performance of their duty, unless they have exceeded their authority, or have acted negligently or oppressively (*Sutton* v. *Clarke*, 6 Taunt. 29; *Grocers' Company* v. *Donne*, 3 Bing. N. C. 34; *Boulton* v. *Crowther*, 2 B. & C. 703; *Metcalfe* v. *Hetherington*, 11 Ex. 257; 5 H. & N. 719; *Ruck* v. *Williams*, 3 H. & N. 308; 27 L. J. Ex. 357; *Penhallow* v. *Mersey Docks Board*, 30 L. J. Ex. 329; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765); so they are not liable for the negligence or tortious acts of servants and contractors necessarily employed by them, provided they have not been guilty of any negligence in appointing them. (*Ib.*; *Hall* v. *Smith*, 2 Bing. 156; *Scott* v. *Mayor of Manchester*, 2 H. & N. 204; 26 L. J. Ex. 132, 406; *Holliday* v. *Vestry of St. Leonards*, 30 L. J. C. P. 361; and see *ante*, "*Master and Servant*," p. 313.)

B. & Ald. 837; *Ruck* v. *Williams*, 3 H. & N. 308; 27 L. J. Ex. 357; *Grocers' Company* v. *Donne*, 3 Bing. N. C. 34.

Against a local board of health for negligently keeping sewers: Itchin Bridge Co. v. *Southampton Local Board of Health*, 8 E. & B. 801.

Against commissioners under an Act of Parliament for the making of certain navigation works for negligence, whereby the plaintiff's land was flooded: Allen v. *Hayward*, 7 Q. B. 960.

Against the corporation of a town for providing a dangerous wringing machine under the Baths and Washhouses Act, in using which the plaintiff was injured: Cowley v. *Mayor of Sunderland*, 6 H. & N. 565; 30 L. J. Ex. 127.

Against the trustees of a turnpike road for negligently maintaining the drains of the road: Whitehouse v. *Fellowes*, 30 L. J. C. P. 365; 10 C. B. N. S. 765.

Counts for keeping areas, cellars, etc., open and improperly fenced, adjoining public highways, in consequence of which the plaintiff sustained injury: see "Nuisance," infra.

Counts by the executors or administrators of persons killed by the negligence of the defendant, on behalf of surviving relatives, under Lord Campbell's Act: see ante, "Executors," p. 284.

Counts against a master for injuries caused by the negligence of his servant: see ante, "Master and Servant," p. 313.

Nuisance (a).

For placing on a Highway an Obstruction which the Plaintiff fell over.

That the defendant wrongfully dug a trench and heaped up earth

(a) Nuisances are either *public* nuisances, as obstructions to highways, noxious trades, etc., which are indictable offences, or *private* nuisances, which are injuries to private property, as obstructing lights, or rights of way, diverting watercourses, etc. (3 Bl. Com. 216.) The latter are for the most part injuries to easements, and will be found arranged under the titles "*Ways*," "*Watercourses*," "*Lights*," etc. Some, however, may be conveniently collected under the present title of private nuisances, as polluting the air, nuisances by noise, smoke, etc. See the forms and references given above.

No action will lie for a public nuisance at the suit of a private person, unless he has thereby sustained particular damage over and above what is common to others (3 Bl. Com. 220); thus, no action will lie merely for placing an obstruction on a public highway, but if a person suffers damage by driving or falling against it, he may maintain an action for such damage (see cases, *supra*); so if an obstruction of the highway prevents access to a person's abode, he may maintain an action for the damage thereby done to his trade. (*Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281; *Rose* v. *Groves*, 5 M. & G. 613; *Simmons* v. *Lillystone*, 8 Ex. 431.)

In actions for nuisances where they are continuing, and the circumstances

and stones in a public highway so as to obstruct it, whereby the plaintiff, whilst lawfully passing along the said highway, fell over the said earth and stones [*or* into the said trench] and broke his arm and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

Like counts: Ellis v. *The Sheffield Gas Co.*, 2 E. & B. 767; *Sadler* v. *Henlock*, 4 E. & B. 571.

For keeping an Obstruction on a Highway unguarded, whereby the Plaintiff's Carriage was upset.

That the defendant wrongfully suffered certain earth and rubbish, which had been placed by him in a heap on a public highway, to remain there during the night, without any light or means to prevent persons from driving against the same; whereby the plaintiff, whilst he was lawfully driving along the said highway in the night-time, drove his horse and carriage against the said earth and rubbish and upset the said carriage and broke the same and lamed the said horse, and the plaintiff and his wife, who were then riding in the said carriage, were thrown out and injured, and the plaintiff incurred expense for medical attendance and for repairing the said carriage and curing the said horse, and was deprived for a long time of the use of the said carriage and horse, and was hindered in his business.

Like counts: Peachey v. *Rowland*, 13 C. B. 182; *Burgess* v. *Gray*, 1 C. B. 578; *Hardwick* v. *Moss*, 31 L. J. Ex. 205.

Against a surveyor of highways for leaving gravel on the highway at night without proper precautions: Davis v. *Curling*, 8 Q. B. 286. [*He is not liable for mere omission to repair, ante, p.* 294.]

Against the trustees of a public road for leaving in the road heaps of road-scrapings, which the plaintiff fell over: Harris v. *Baker*, 4 M. & S. 27.

Against the owner of a house, where rubbish was placed on the highway by a workman employed in repairing it: Bush v. *Steinman*, 1 B. & P. 404.

For placing rubbish on a highway by the side of a canal, whereby the plaintiff fell in: Goldthorpe v. *Hardman*, 13 M. & W. 377.

For digging a hole in the highway and leaving it without any light or signal: Newton v. *Ellis*, 5 E. & B. 115.

For exposing dangerous implements for sale on a public highway, by falling against which the plaintiff was injured: Marriott v. *Stanley*, 1 M. & G. 568.

Against a waterworks company for keeping a fire-plug uncovered in a highway, in consequence of which plaintiff's horse placed his

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make it advisable, the plaintiff may, by his writ and declaration, claim an injunction. (See *ante*, "*Injunction*," p. 296.)

Damages cannot be claimed for an anticipated continuance of a nuisance, because repeated actions may be brought for the continuance. (*Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *Battishill* v. *Reed*, 25 L. J. C. P. 290.) If the defendant persists in continuing a nuisance after a verdict against him for nominal damages, the jury in a second action may give vindictive damages to compel him to abate the nuisance. (*Ib.*)

foot in the plug-hole and was lamed: Bayley v. *Wolverhampton Waterworks Co.*, 30 L. J. Ex. 57.

For keeping a dangerous Cellar open adjoining a Public Highway (a).

That the defendant was possessed of a vault or cellar immediately adjoining a public highway, and wrongfully suffered the said vault or cellar to be open to the said highway without any railing, fence,

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(*a*) Making an excavation, cellar, or area adjoining a public way, or keeping such an excavation, cellar, or area insecurely fenced and guarded, so as to render the way unsafe to those who use it with ordinary care, is a nuisance, for which an action will lie at the suit of a person who is injured by falling into it, or otherwise, while using the public way. (*Barnes* v. *Ward*, 9 C. B. 392.) In general, a person would not be liable to an action in respect of open excavations on his own land, at such a distance from the highway as not to amount to a nuisance; (*Ib.*; *Stone* v. *Jackson*, 16 C. B. 199; *Hardcastle* v. *South Yorkshire Ry. Co.*, 28 L. J. Ex. 139); although the land is waste land open to the public. (*Hounsell* v. *Smyth*, 7 C. B. N. S. 731; 29 L. J. C. P. 203.)

A person using private premises, though with the permission of the owner, cannot, except under special circumstances, maintain an action to recover damages for an injury occasioned to him by the dangerous state of the premises. (*Seymour* v. *Maddox*, 16 Q. B. 326; *Southcote* v. *Stanley*, 25 L. J. Ex. 339; *Bolch* v. *Smith*, 31 L. J. Ex. 201; *Gallagher* v. *Humphery*, 10 W. R. Q. B. 664.) Where the plaintiff was lawfully using a road on private premises, and was injured by driving against an obstruction placed thereon by the defendant, he was held entitled to recover. (*Corby* v. *Hill*, 4 C. B. N. S. 556; 27 L. J. C. P. 318.) Where the defendant left a trap-door open in the entrance of his shop, he was held liable for an injury to a customer falling into it. (*Chapman* v. *Rothwell*, 27 L. J. Q. B. 315; 1 E. B. & E. 168.) As to when a trespasser can sue, see the cases cited p. 327.

Where the nuisance is caused by real property or the use of real property, the occupier is *primâ facie* liable, and not the owner merely as owner; the latter can only be charged upon some special ground of liability. (*Russell* v. *Shenton*, 3 Q. B. 448; *Chauntler* v. *Robinson*, 4 Ex. 163, 169; *Cheetham* v. *Hampson*, 4 T. R. 318; *Bishop* v. *Trustees of Bedford Charity*, 28 L. J. Q. B. 215; 29 L. J. Q. B. 53; 1 E. & E. 697; *Pickard* v. *Smith*, 10 C. B. N. S. 470.) If the damage arises from the nonfeasance or the misfeasance of the landlord of premises demised, the party injured may sue him. (*Todd* v. *Flight*, 9 C. B. N. S. 377, 389.)

As where the landlord knowingly lets land with a standing and continuing nuisance upon it, and suffers it to continue, as with a wall which obstructed the plaintiff's light (*Rosewell* v. *Prior*, 2 Salk. 460; 1 L. Raym. 713), with a noxious privy (see *R.* v. *Pedly*, 1 A. & E. 822, explained in *Rich* v. *Basterfield*, 4 C. B. 783, 804), with a dangerous stack of chimneys (*Todd* v. *Flight*, 9 C. B. N. S. 377), the landlord is liable.

So where the landlord is bound to repair and neglects to do so, he is liable for an injury occasioned by the want of repair. (*Payne* v. *Rogers*, 2 H. Bl. 350.) In such case, it is said, the occupier is not liable at all. (*Ib.*; but see *Russell* v. *Shenton*, 3 Q. B. 449, 458.) The landlord is not liable for injuries arising from the want of repair of the premises, unless he is under an obligation to repair. (*Cheetham* v. *Hampson*, 4 T. R. 318; *Russell* v. *Shenton*, 3 Q. B. 449.) And the landlord is not liable for nuisances occasioned by the use of the premises by the occupier, and not by the premises alone, as for a nuisance of smoke out of a chimney let with the premises. (*Rich* v. *Basterfield*, 4 C. B. 783.)

or protection, and so as to be dangerous to persons lawfully passing along the said highway; and thereby the plaintiff, whilst lawfully passing along the said highway, fell into the said vault or cellar; whereby he was wounded and permanently injured, and was prevented for a long time from attending to his business, and incurred expense for medical attendance.

Against the person in occupation for keeping the grating of a cellar under a public footway out of repair, whereby the plaintiff fell through and was injured: Bishop v. *Bedford Charity,* 28 L. J. Q. B. 215; 29 L. J. Q. B. 53; 1 E. & E. 697.

For a nuisance in keeping an open area adjoining to a public highway, into which the plaintiff fell and was injured: Jarvis v. *Dean,* 3 Bing. 447; *Coupland* v. *Hardingham,* 3 Camp. 398; *Barnes* v. *Ward,* 9 C. B. 392; *Stone* v. *Jackson,* 16 C. B. 199.

For making a dangerous reservoir of water adjoining a public way, into which a person fell and was drowned: Hardcastle v. *South Yorkshire Ry. Co.,* 28 L. J. Ex. 139; 4 H. & N. 67.

Against commissioners of sewers for keeping an open sewer by the side of a public highway: Cornwell v. *Metropolitan Commissioners of Sewers,* 10 Ex. 771 [*where see the law respecting the duty of fencing ditches, etc., in land adjoining public highways*].

Count for obstructing a public right of way, whereby the plaintiff was injured in his trade by reason of customers not being able to approach his shop: Wilkes v. *Hungerford Market Co.,* 2 Bing. N. C. 281; *Bradbee* v. *Christ's Hospital,* 4 M. & G. 714.

For obstructing a public footpath through the plaintiff's land, whereby he and his servants were compelled to go round in passing from one part of the land to another, and were so delayed in their business: Blagrove v. *Bristol Waterworks Co.,* 1 H. & N. 369.

For obstructing the access to the plaintiff's house by a public navigable river: Rose v. *Groves,* 5 M. & G. 613; *Davis* v. *Walton,* 8 Ex. 153; *Simmons* v. *Lillystone,* 3 Ex. 431.

Count by a reversioner for obstructing the access to the house by a public highway: Vallance v. *Savage,* 7 Bing. 595.

For obstructing the plaintiff's right of way on a railroad: Tanner v. *South Wales Ry. Co.,* 25 L. J. Q. B. 7; 5 E. & B. 618.

Count for obstructing the public road with omnibuses so as to obstruct the business of a rival omnibus proprietor: Green v. *London General Omnibus Co.,* 29 L. J. C. P. 13.

Count for a nuisance on a private way which the plaintiff was licensed to use: Corby v. *Hill,* 27 L. J. C. P. 318; 4 C. B. N. S. 556; *Gallagher* v. *Humphery,* 10 W. R. Q. B. 664.

For setting spring-guns on defendant's own land, whereby the plaintiff trespassing without notice thereof was shot: Bird v. *Holbrook,* 4 Bing. 628. [*If the plaintiff trespassed with notice of the spring-guns the action will not lie: Holt* v. *Wilkes,* 3 B. & Ald. 304; *where see another count.*]

For setting dog-traps and dog-spears near public paths: Townsend v. *Wathen,* 9 East, 277; *Deane* v. *Clayton,* 7 Taunt. 489;

Jordin v. *Crump*, 8 M. & W. 782. [*As to when the action will lie, see ib.*]

For a Nuisance in Polluting the Water under the Plaintiff's Land.

(*Venue local.*) That the plaintiff was possessed of certain land and of a well therein and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water, which flowed and ran into the said well to supply the same, so flow and run without being fouled or polluted; and the defendant wrongfully fouled and polluted the said well and the said water therein, and the said springs and streams of water which flowed into the said well; whereby the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family were and are deprived of the use and benefit of the said well and water.

A like count: Hipkins v. *Birmingham Gas Co.*, 30 L. J. Ex. 60; 5 H. & N. 74; 6 H. & N. 250.

For a Nuisance to the Plaintiff's Dwelling-house by causing Offensive Smells.

(*Venue local.*) That the defendant wrongfully caused divers offensive and pestilential stenches and vapours to arise, come, and be in and about the dwelling-house of the plaintiff; whereby the said dwelling-house was rendered unhealthy and unfit for habitation.

Like counts: Flight v. *Thomas*, 10 A. & E. 590; *Hole* v. *Barlow*, 27 L. J. C. P. 207; 4 C. B. N. S. 334.

For a Nuisance in carrying on a Noxious Manufacture on the Land adjoining the Plaintiff's.

(*Venue local.*) That the defendant wrongfully caused to issue and proceed from certain smelting-works carried on by the defendant large quantities of offensive, poisonous, and unwholesome smoke and other vapours and noxious matter, which spread and diffused themselves over and upon certain lands of the plaintiff, and impregnated and corrupted the air, and settled and deposited on the soil and surface of the said lands, whereby the trees, hedges, herbage and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and live stock of the plaintiff on the said lands became unhealthy and diseased, and divers of them were poisoned and died; and by reason of the premises the plaintiff was unable to depasture the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

Count for carrying on a noxious trade, with a claim of a writ of injunction to restrain it, under the C. L. P. Act, 1854: *Delarue* v. *Fortescue*, 26 L. J. Ex. 339; 2 H. & N. 324. [*Hole* v. *Barlow*, 27 L. J. C. P. 207; 4 C. B. N. S. 437, *which held that this action will*

not lie where the trade, though noxious, is carried on in a proper and convenient place, has been overruled by the Court of Exch. Ch. in Bamford v. *Turnley*, 10 W. R. 803, *where the action was for a nuisance by burning bricks. And see Stockport Waterworks Co.* v. *Potter*, 31 L. J. Ex. 9.]

For carrying on a manufacture of iron, causing a nuisance by the noise: Elliotson v. *Feetham*, 2 Bing. N. C. 134; *Mumford* v. *Oxford W. & W. Ry. Co.*, 25 L. J. Ex. 265; 1 H. & N. 34.

A like count for carrying on a manufactory causing a nuisance by smoke: Simpson v. *Savage*, 26 L. J. C. P. 50; 1 C. B. N. S. 347. [*These actions will not lie at the suit of a reversioner, because the nuisance is not of a permanent nature, Ib.; see post, "Reversion."*]

Against the occupier of the adjoining property for keeping offensive drains: Russell v. *Shenton*, 3 Q. B. 449; *Itchin Bridge Co.* v. *Local Board of Health of Southampton*, 28 L. J. Q. B. 41; 8 E. & B. 801.

For keeping a badly constructed sewer on the defendant's land, whereby an overflow of the contents was discharged on the plaintiff's premises: Alston v. *Grant*, 3 E. & B. 128.

For causing water to flow against the plaintiff's dwelling-house by means of a neighbouring embankment: Brine v. *Great Western Ry. Co.*, 31 L. J. Q. B. 101.

Against the owner of the adjoining house for building a projecting cornice, which cast the rain-water from the defendant's roof on to the plaintiff's premises: Fay v. *Prentice*, 1 C. B. 828. *A like count by a reversioner: Tucker* v. *Newman*, 11 A. & E. 40.

Against the landlord of the adjoining house who had demised it with a dangerous chimney which fell on to the plaintiff's house: Todd v. *Flight*, 30 L. J. C. P. 21. [*As to the liability of landlords in such cases, see ante, p.* 326, *n.*]

Partners (*a*).

(*a*) If several persons are jointly entitled to property injured, they may join in suing for the injury; or each may sue separately, and the objection that the other parties entitled should be joined can only be taken by plea in abatement; but the party suing alone can only recover damages proportionate to his interest (*Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279; *Bloxam* v. *Hubbard*, 5 East, 407; *Broadbent* v. *Ledward*, 11 A. & E. 209): after one joint-owner has sued separately and recovered damages, the defendant in an action at the suit of the other joint-owner cannot plead the nonjoinder of the former in abatement. (*Sedgworth* v. *Overend*, 7 T. R. 279.) The assignee of a separate part of a patent may sue alone for an infringement of that part, and a plea in abatement of the nonjoinder of the owners of the other part of the patent is bad. (*Dunnicliff* v. *Malet*, 29 L. J. C. P. 70; 7 C. B. N. S. 209.) A person entitled in common with another to the use of a trade mark may sue alone in Chancery for an injunction to restrain its use, and for an account and payment of profits. (*Dent* v. *Turpin*, 30 L. J. C. 495.)

Partners in trade may join in suing for a slander concerning their trade

PATENTS (*a*).

For the Infringement of a Patent. (*C. L. P. Act*, 1852, *Sched. B.* 31) (*b*).

That the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of [certain improvements in the manufacture of sulphuric acid], and thereupon her Majesty Queen Victoria, by letters-patent under the Great Seal of England [*or* of the United

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(*Cook* v. *Batchellor*, 3 B. & P. 150; *Maitland* v. *Goldney*, 2 East, 426); so partners in a bank may join in suing for a libel respecting the business of the bank (*Forster* v. *Lawson*, 3 Bing. 452); and it seems that one partner suing separately in respect of damage occasioned to the firm might be met by a plea in abatement. (See *Robinson* v. *Marchant*, 7 Q. B. 918.)

See further as to what parties may sue jointly in actions for wrongs. (*Corylon* v. *Lithebye*, 2 Wms. Saund. 115; and notes *Ib.*)

A partner is liable for a tort committed by his co-partner in the course of the partnership business. Thus the proprietors of a stage coach were held liable for an injury caused by one of them in negligently driving the coach. (*Moreton* v. *Hardern*, 4 B. & C. 223.) The proprietors of a mine were held liable for an injury to a workman caused by the negligence of one of the proprietors while engaged in the work of the mine. (*Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333.)

By the Carriers Act, 11 Geo. IV. and 1 Will. IV. c. 68, s. 5, it is enacted "that any one or more of mail-contractors, stage proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in any mail, stage-coach or other public conveyance by land for hire."

As to when joint-tenants and tenants in common of land or goods can sue each other in trespass or trover, see *ante*, p. 254 n., *post*, p. 356, 359 n., and *post*, "Conversion" and "Trespass," c. 6.

(*a*) Patent rights are created and regulated by statute law. The principal statutes relating to patents are the Statute of Monopolies, 21 Jac. I. c. 3; 5 & 6 Will. IV. c. 83; 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69. ss. 2–7; 15 & 16 Vict. c. 83 (the Patent Law Amendment Act, 1852); 16 & 17 Vict. c. 5; and 16 & 17 Vict. c. 115. By the Patent Law Amendment Act, 1852, s. 42, "in any action for the infringement of letters-patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit." As to the application of this section, see *Vide* v. *Smith*, 3 E. & B. 969; *Holland* v. *Fox*, 3 E. & B. 977; *Meadows* v. *Kirkman*, 29 L. J. Ex. 205; *Patent Type Foundry Co.* v. *Lloyd*, 29 L. J. Ex. 207. An injunction may also be applied for under the C. L. P. Act, 1854, s. 79. (*Gittins* v. *Symes*, 15 C. B. 362; and see *ante*, "*Injunction*," p. 296.) See a form of order for an account. (*Walton* v. *Lavater*, 8 C. B. N. S. 162.)

(*b*) This form is given in the schedule to the C. L. P. Act, 1852, and is adapted to letters-patent granted before the passing of the Patent Law Amendment Act, 1852, which was passed in the same session as, but subsequently to, the C. L. P. Act, 1852. The alterations inserted above make it applicable to letters-patent granted under the existing law.

By 15 & 16 Vict. c. 83, s. 18, "letters-patent sealed with the Great Seal of

Kingdom], granted to the plaintiff the sole privilege to make, use, exercise and vend the said invention within England [*or* the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, *or as the case may be*], for the term of fourteen years from the —— day of ——, A.D. ——, subject to a condition that the plaintiff should within six calendar months next after the date of the said letters-patent cause to be enrolled [*or* filed] in the High Court of Chancery an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the plaintiff did within the time prescribed fulfil the said condition, and the defendant during the said term did infringe the said patent right (*a*).

Like counts: Unwin v. *Heath*, 16 C. B. 713; 12 C. B. 522; *Holmes* v. *London and North-Western Ry. Co.*, 12 C. B. 831; *Bovill* v. *Pimm*, 11 Ex. 718; *Smith* v. *London and North-Western Ry. Co.*, 2 E. & B. 69.

A like count, with a prayer for an injunction and an account of profits: Hills v. *London Gas-light Co.*, 5 H. & N. 312; *Walton* v. *Lavater*, 29 L. J. C. P. 275; 8 C. B. N. S. 162.

Particulars of Breaches (15 & 16 *Vict. c.* 83, *s.* 41)·(*b*).

In the ——

Between *A. B.*, plaintiff, and *E. F.*, defendant.

The following are the particulars of the breaches complained of in

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the United Kingdom shall extend to the whole of the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, and in case the warrant for the letters-patent so direct, the letters-patent shall be made applicable to her Majesty's colonies and plantations abroad, or such of them as may be mentioned in the warrant; and such letters-patent shall be valid and effectual as to the whole of such United Kingdom and the said islands and isle and the said colonies or plantations, or such of them as aforesaid, and shall confer the like powers, rights and privileges as might, in case this Act had not been passed, have been conferred by several letters-patent of the like purport and effect passed under the Great Seal of the United Kingdom, under the seal appointed to be used instead of the Great Seal of Scotland, and under the Great Seal of Ireland respectively."

By s. 27, "all letters-patent to be granted under this Act (save only letters-patent granted after the filing of a complete specification) shall require the specification thereunder to be filed in the High Court of Chancery, instead of requiring the same to be enrolled, and no enrolment shall be requisite."

Where a complete specification is filed in the first instance, the letters-patent granted thereon, in lieu of a condition for making void the letters-patent in default of the above requirement, are conditioned to become void if such complete specification is not sufficient. (See s. 9.)

(*a*) A declaration by a patentee of an exclusive right to "vend," charging that the defendant "exposed to sale," was held bad, as not showing an infringement. (*Minter* v. *Williams*, 4 A. & E. 251.) Selling imported articles made in imitation of the invention is an infringement, although the defendant did not know them to be so made. (*Walton* v. *Lavater*, 29 L. J. C. P. 275.)

(*b*) By the Patent Law Amendment Act, 1852, s. 41, "in any action for

this action: that the defendant on and between the —— day of —— A.D. —— and the —— day of ——, A.D. ——, at ——, in the county of ——, used the same process for the manufacture of sulphuric acid as is described in the specification of the letters-patent granted to the plaintiff as in the declaration mentioned [*stating thus the breaches complained of according to the fact*].

Dated the —— day of ——, A.D. ——.

To *G. H.*, defendant's attorney or agent.

Yours, etc.,
C. D., plaintiff's attorney.

See a form of particulars, Talbot v. *La Roche*, 15 C. B. 310.

By the Assignee of a Patent for Infringement.

That *G. H.* was the first and true inventor of a certain new manufacture, that is to say, of [*state the nature of the invention*], and thereupon her Majesty Queen Victoria, by letters-patent under the Great Seal of [the United Kingdom] granted to the said *G. H.* and his assigns the sole privilege to make, use, exercise and vend the said invention within [the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man], for the term of fourteen years from the —— day of ——, A.D. ——, subject to a condition that the said *G. H.* should within six calendar months next after the date of the said letters-patent cause to be enrolled [*or* filed] in the High Court of Chancery, an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the said *G. H.* did within the time prescribed fulfil the said condition; and afterwards the said *G. H.* by deed granted and assigned to the plaintiff the said sole privilege to make, use, exercise, and vend the said invention as aforesaid for the term aforesaid, together with the said letters-patent, and all the liberties and privileges by the said letters-patent granted to the said *G. H.* as aforesaid; and the defendant during the said term, and after the said grant and assignment, did infringe the said patent right.

Like counts: Chollett v. *Hoffman*, 26 L. J. Q. B. 249; *Shlumberger* v. *Lister*, 29 L. J. Q. B. 157.

Count by the assignee of a patent stating a disclaimer of part: Spilsbury v. *Clough*, 2 Q. B. 466.

Count by the patentee and the assignee of a moiety, as joint plaintiffs, for the infringement of a patent: Cornish v. *Keene*, 3 Bing. N. C. 570.

Count by the assignee of a separate part of a patent for an in-

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the infringement of letters-patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the said action, and the defendant, on pleading thereto, shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas in the said action; and at the trial of such action no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such letters-patent which shall not be contained in the particulars delivered as aforesaid: provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters-patent shall be stated in such particulars."

fringement of that part: Dunnicliff v. *Mallet*, 29 L. J. C. P. 70; 7 C. B. N. S. 209.

Count by the assignee of the two several moieties of a patent against the patentee for an infringement by the latter after he had assigned all his interest: Walton v. *Lavater*, 29 L. J. C. P. 27; 8 C. B. N. S. 162.

For Infringement of a Patent, stating a disclaimer or alteration of part (a).

That the plaintiff was the first and true inventor of so much of a certain new manufacture, that is to say, of [*state the nature of the invention*] as was not disclaimed [*or* altered] by him as hereinafter mentioned, and thereupon her Majesty Queen Victoria, by letters-patent under the Great Seal of [England], granted the plaintiff the sole privilege to make, use, exercise and vend the said invention within [England] for the term of fourteen years from the —— day of ——, A.D. ——, subject to a condition that the plaintiff should within six calendar months after the date of the said letters-patent cause to be [enrolled] in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the plaintiff did within the time prescribed fulfil the said condition; and afterwards and after the passing of an Act of Parliament passed in the sixth year of the reign of his late Majesty King William the Fourth, to amend the law touching letters-patent for inventions, [and of the Patent Law Amendment Act, 1852,] the plaintiff, pursuant to the said statute [*or* statutes], and by and with the leave of her present Majesty's Attorney- [*or* Solicitor-] General first had and obtained for that purpose and duly certified by his fiat and signature in that behalf, entered duly and according to the statute [*or* statutes] in that case made and provided a disclaimer [*or* memorandum of alteration] of part of the title of the said invention and of the said specification, stating the reason for such disclaimer, and not being such disclaimer [*or* alteration] as extended the exclusive right granted by the said letters-patent; and the title of the said invention as altered by the said disclaimer [*or* memorandum of alteration] was and is [*state the title*], and the said disclaimer [*or* memorandum of alteration] was afterwards duly filed [and enrolled] with the said specification to which the same related pursuant to the statute [*or* statutes] in that case made and provided; yet the defendant during the said term, and after the said disclaimer [*or* memorandum of alteration] was so entered and filed [and enrolled] as aforesaid, did infringe the said patent-right otherwise than in relation to the parts of the said invention so disclaimed [*or* altered] as aforesaid.

(*a*) As to the disclaimer and alteration of patents and specifications, see the provisions 5 & 6 Will. IV. c. 83, s. 1, and 15 & 16 Vict. c. 83, s. 39. The latter section provides that no action shall be brought upon any letters-patent in which or on the specification of which any disclaimer or memorandum of alteration shall have been filed in respect of any infringement committed prior to the filing of such disclaimer or memorandum of alteration, unless the law-officer shall certify in his fiat that any such action may be brought notwithstanding the entry or filing of such disclaimer or memorandum of alteration.

Like counts: Stocker v. *Warner*, 1 C. B. 148; *Talbot* v. *La Roche*, 15 C. B. 310; *Platt* v. *Else*, 8 Ex. 364; *Seed* v. *Higgins*, 8 E. & B. 755.

Count for the infringement of a patent right stating two disclaimers: Tetley v. *Easton*, 26 L. J. C. P. 269; 2 C. B. N. S. 706.

Count for the infringement of a patent-right renewed under 5 & 6 Will. IV. c. 83, after the expiration of the original term: Russell v. *Ledsam*, 14 M. & W. 574.

Count for penalties for the unauthorized use of the name of a patent, under 5 & 6 Will. IV. c. 87, s. 7: Myers v. *Baker*, 28 L. J. Ex. 90; 3 H. & N. 802.

Penal Statutes. (See *ante*, p. 202.)

Police (*a*).

(*a*) By the 10 Geo. IV. c. 44 (relating to the Metropolitan Police), s. 41, it is enacted "For the protection of persons acting in the execution of this Act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases, and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon."

The Act 2 & 3 Vict. c. 47 (for improving the police of the metropolis), is by s. 79, to be construed with the above Act.

By the 2 & 3 Vict. c. 71 (for regulating the police-courts in the metropolis), s. 53, it is enacted "That no action, suit, or information, or any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities under this Act, unless twenty days' previous notice (which must now be a

PEW.

Count for Disturbing the Plaintiff's Right to a Pew.

(*Venue local.*) That the plaintiff was possessed of and inhabited

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calendar month's notice by the 5 & 6 Vict. c. 97) in writing shall be given by the party intending to commence and prosecute such suit, information, or other proceeding to the intended defendant, nor unless such action, suit, information, or other proceeding, shall be brought or commenced within three calendar months next after the Act committed, or in case there shall be a continuation of damage, then within three calendar months next after the doing or committing such damage shall have ceased, or unless such action, suit, or information, shall be laid and brought in the county of Middlesex; and if the plaintiff shall become nonsuited, or shall suffer a discontinuance of his suit, information, or other proceeding, after the defendant shall have appeared thereto, or if a verdict shall pass against the plaintiff thereon, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall have his costs as between attorney and client, and shall have such remedy for recovering the same as defendants have for recovering costs of suit by law in other cases."

And by s. 55 this Act is to be construed together with the two former as one Act.

The 1 & 2 Will. IV. c. 41 (relating to special constables), s. 19, enacts precisely the same terms as the 10 Geo. IV. c. 44, s. 41, above cited; and the 2 & 3 Vict. c. 93 (relating to county police), by s. 8, incorporates the same provisions with reference to constables appointed under it.

See further as to the statutes relating to the police, Chit. Statutes.

By the 24 Geo. II. c. 44, s. 6, it is enacted "That no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid for any such cause as aforesaid without making the justice or justices who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices; and if such action be brought jointly against such justice or justices, and also against such constable, headborough, or other officer, or person or persons acting in his, or their aid as aforesaid, then on proof of such warrant the jury shall find for such constable, headborough, or other officer, and for such person or persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice or justices, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid."

See further as to actions against constables and peace-officers, 2 Chit. Pr. 11th ed. 1264.

a dwelling-house in the parish of ——, and by reason thereof was entitled to the use, for himself and his family inhabiting the said dwelling-house, of a pew in the parish church of —— aforesaid, to attend and hear divine service therein, as to the said dwelling-house appertaining; and the defendant disturbed the plaintiff in the enjoyment of his said right by wrongfully pulling down and prostrating a part of the said pew, and enclosing and separating a part of the said pew from the residue thereof [*or* by entering and causing other persons to enter the said pew during divine service]; whereby the plaintiff was hindered and prevented from using the said pew for himself and his said family in so ample a manner as he might otherwise have done.

Like counts: Stocks v. *Booth*, 1 T. R. 428; *Mainwaring* v. *Giles*, 5 B. & Ald. 356; *Harris* v. *Drewe*, 2 B. & Ad. 164; *Adams* v. *Andrews*, 15 Q. B. 284.

Pound. (See "*Distress*," *ante*, p. 282.)

Public Health (*a*).

Forms of commencement of declarations by and against the clerk of a local board of health: see ante, p. 25.

(*a*) By the Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 138, it is enacted "That the local board of health of any non-corporate district may sue and be sued in the name of the clerk for the time being, for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things vested or to become vested in them by reason of the provisions of this Act, or relating to any matter or thing whatsoever entered into or done, or intended to be entered into or done, by them under the provisions of this Act; and in any action of ejectment brought or prosecuted by such local board, it shall be sufficient to lay the demise in the name of the said clerk. And in proceedings by or on the part of such local board against any person for stealing or wilfully injuring or otherwise improperly dealing with any property, works, or things belonging to them or under their management, it shall be sufficient to state generally that the property or thing in respect of which the proceeding is instituted is the property of the said clerk; and all legal proceedings by, on the part of, or against such local board under this Act, may be preferred, instituted, and carried on in his name; and no proceedings whatever shall abate or be discontinued by the death, resignation, or removal of the clerk, or by reason of any change or vacancy in such local board by death, resignation, or otherwise; provided always, that the clerk in whose name any such action or suit, complaint, information, or proceeding may be brought, preferred, instituted, or defended as aforesaid, shall be fully reimbursed out of the general district rates to be levied under this Act all such costs, charges, damages, and expenses as he shall, or may be, or become liable to pay, sustain, or put unto by reason of his name being so used."

By s. 139, "That no writ or process shall be sued out against or served upon any superintending inspector, or any officer or person acting in his aid or under the direction of the general board of health, nor against the local board of health or any member thereof, or the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, for anything done

RAILWAY. See "*Fences*," *ante*, p. 287; "*Negligence*," *ante*, *p.* 320.

REPLEVIN (*a*).

Count in Replevin.

(*Venue local.*) (*Commence with the ordinary form, ante, p.* 1; *or if*

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or intended to be done under the provisions of this Act, until the expiration of one month next after notice in writing shall have been delivered to him or left at their or his office or usual place of abode, clearly and explicitly stating the cause of action, and the name and place of abode of the intended plaintiff and of his attorney or agent in the cause; and upon the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the last-mentioned notice; and unless such notice be proved, the jury shall find for the defendant; and every such action shall be brought or commenced within six months next after the accrual of the cause of action, and not afterwards; and shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere; and the defendant shall be at liberty to plead the general issue, and give this Act and all special matter in evidence thereunder; and any person to whom any such notice of action is given as aforesaid, may tender amends to the plaintiff, his attorney, or agent, at any time within one month after service of such notice, and in case the same be not accepted, may plead such tender in bar, and (by leave of the court) with the general issue or other plea or pleas; and if upon issue joined upon any plea pleaded to the whole action the jury find generally for the defendant, or if the plaintiff be nonsuited or discontinue, or if judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly; and in case amends have not been tendered as aforesaid, or in case the amends tendered be insufficient, the defendant may, by leave of the court, at any time before trial, pay into court, under plea, such sum of money as he may think proper, and (by the like leave) may plead the general issue or other plea or pleas, any rule of court or practice to the contrary notwithstanding."

By s. 140, "That no matter or thing done or contract entered into by the local board of health, nor any matter or thing done by any superintending inspector, or any member of the said local board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said local board, shall, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever; and any expense incurred by any such local board, member, officer of health, clerk, surveyor, inspector of nuisances, or other officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of this Act."

By the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 4, that Act is to be construed together with, and to be deemed to form part of, the Public Health Act, 1848, and therefore incorporates the provisions above cited.

(*a*) *Replevin.*]—The action of replevin, it is said, lies wherever goods have been unlawfully taken out of the possession of the owner. (Com. Dig. Pl. 3, K. 1; *Galloway* v. *Bird*, 4 Bing. 299; *Mellor* v. *Leather*, 1 E. & B. 619; *George* v. *Chambers*, 11 M. & W. 149; *Allen* v. *Sharp*, 2 Ex. 352.) But it is not usual to have recourse to this remedy, except in cases of goods unlawfully distrained; and it has been recently questioned whether it was

the action has been removed by certiorari, commence with the form, ante, p. 27.) That the defendant, in a certain dwelling-house called ——, took the goods of the plaintiff, that is to say, household furniture; [and in a certain close called —— took other goods of the plaintiff, that is to say, horses, carriages, and ploughs], and unjustly detained the same against sureties and pledges until, etc., whereby the plaintiff has sustained damage.

Reversion.

General Form of Count for an Injury to the Plaintiff's Reversion in Land, etc. (*a*).

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ever applicable in any other case. (*Mennie* v. *Blake*, 25 L. J. Q. B. 399; 6 E. & B. 842.)

Replevin consists in the re-delivery of the goods taken to the owner. This was formerly made by the sheriff, who took the goods from the distrainer, and re-delivered them to the owner upon the execution of a replevin bond by the owner and two sureties, conditioned to prosecute his suit with effect and without delay against the distrainor, and to return the goods if a return should be awarded. Stat. Marlbridge, 52 Hen. III. c. 21; Stat. Westm. 2nd 13 Edw. I. c. 2; 11 Geo. II. c. 19, s. 23. By the Act 19 & 20 Vict. c. 108 (to amend the Acts relating to the county courts), ss. 63–66, the powers and responsibilities of the sheriff with respect to replevin bonds and replevins were taken away; and the same or similar powers were transferred to the registrar of the county court, who now grants replevin upon security being given for prosecuting the suit, under ss. 64, 65, and 66 of the above Act. See *ante*, p. 204.

Formerly the action of replevin could not be commenced in the superior courts. It was commenced in the old county court, from which it might be removed by either party into a superior court. Upon the establishment of the new county courts, by the statute 9 & 10 Vict. c. 95, s. 119, all actions of replevin in cases of distress for rent in arrear and damage feasant were transferred to those courts, subject to a power of removing the action into the superior courts. But now, by the above statute, 19 & 20 Vict. c. 108, ss. 65, 66, an action of replevin may be commenced in any superior court, or in the county court at the option of the plaintiff, upon his giving the security required by the Act. And by s. 67 the action may be removed into any superior court by writ of certiorari upon application by the defendant to the court or a judge for such writ, and upon his giving the security required by that section. By s. 70 the security required to be given for the above purposes is to be in the form of a bond, with sureties to the other party in the action or proceeding. See *ante*, "*Replevin Bonds*," p. 204.

By the C. L. P. Act, 1860, s. 22, the provisions of the above Act, 19 & 20 Vict. c. 108, which relate to replevin shall be deemed and taken to apply to all cases of replevin in like manner as to the replevin of goods distrained for rent or damage feasant.

In the declaration in this action the place where the goods were taken, and also the goods taken, must be described with sufficient particularity to inform the defendant. (1 Wms. Saund. 347 (1); *Banks* v. *Angell*, 7 A. & E. 855.) The place should be described by name or abuttals as in trespass, *post*, p. 244, and the goods should be described as in trover. (2 Wms. Saund. 74 (1), 74 *b*; *ante*, p. 255.) Causes of action in replevin cannot be joined in the same suit with any other. (C. L. P. Act, 1852, s. 41.)

(*a*) An action lies for an injury done to the reversionary right of the

(*Venue local.*) That certain land [*or* a dwelling-house] was in the possession of *G. H.* as tenant thereof to the plaintiff, the reversion thereof then belonging to the plaintiff; and the defendant injured the plaintiff's said reversion in the said land [*or* dwelling-house] by wrongfully cutting down divers trees growing on the said land [*or* wrongfully pulling down the walls of the said dwelling-house *stating the acts complained of according to the fact*].

A like count by a trustee where the premises were let by a cestui que trust: Vallance v. *Savage*, 7 Bing. 595; *by a mortgagee against a mortgagor in possession: Hitchman* v. *Walton*, 4 M. & W. 409.

For an Injury to the Reversion by removing Fixtures (*a*).

That a dwelling-house, with certain fixtures annexed and belong-

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plaintiff in land, etc. The declaration must either state something which is necessarily an injury to the reversion, as the cutting down timber trees or the like; or, if it state something which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. Where that which is stated cannot be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff; where it must be an injury to the reversion, that concluding allegation is unnecessary. (Per Willes, J., *Metropolitan Ass.* v. *Petch*, 5 C. B. N. S. 504, 513; *Jackson* v. *Pesked*, 1 M. & S. 234; *Kidgill* v. *Moor*, 9 C. B. 364.) The allegation may be supported by proof of any act injurious to the land of a permanent character, although the damage might be remedied before the reversion came into possession: thus, opening a new door in a house (*Young* v. *Spencer*, 10 B. & C. 145), obstructing a right of way (*Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *Midland Ry. Co.* 10 C. B. N. S. 287), obstructing ancient lights (*Metropolitan Ass.* v. *Petch*, 27 L. J. C. P. 330; 5 C. B. N. S. 504), building a roof with eaves which discharge the rain-water on the land (*Tucker* v. *Newman*, 11 A. & E. 40) may be injurious to the reversion, and will warrant the jury in so finding.

The action will not lie for an act which is necessarily of a temporary character, as for a nuisance of mere noise, although less rent is paid by the tenant in consequence of the noise (*Mumford* v. *Oxford W. & W. Ry. Co.*, 25 L. J. Ex. 265; 1 H. & N. 36); or for a nuisance of smoke (*Simpson* v. *Savage*, 26 L. J. C. P. 50; 1 C. B. N. S. 347). The action will not lie for an act, which is not in fact injurious to the reversion, merely in respect of its being done with the intent to establish an easement in and upon the land by prescription, as the exercise of a right of way (*Baxter* v. *Taylor*, 4 B. & Ad. 72), or of a right to discharge rain-water (*Tucker* v. *Newman*, 11 A. & E. 40); such act would not be evidence against the reversioner, for the Prescription Act, 2 & 3 Will. IV. c. 71, s. 8, reserves to the reversioner three years for resisting any such claim after his estate has come into possession, although the full period of prescription has previously elapsed. (See *Bright* v. *Walker*, 1 C. M. & R. 220.)

The action by the reversioner is independent of the remedy which the tenant may have for the same act in respect of the damage to his possession; and the reversioner also may bring repeated actions for a continuing injury. (*Battishill* v. *Reed*, 25 L. J. C. P. 290; 18 C. B. 696; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97.) Damages for an anticipated continuance of the nuisance cannot be recovered; but if the defendant persists in continuing the nuisance after a verdict against him for nominal damages, the jury in a second action may give vindictive damages to compel him to abate the nuisance. *Ib.*

(*a*) If the fixtures are not the property of the reversioner, the action will

ing thereto, was in the possession of *G. H.* as tenant thereof to the plaintiff, the reversion thereof then belonging to the plaintiff, and the defendant injured the plaintiff's said reversion in the said dwelling-house and fixtures by wrongfully pulling down and removing from the said dwelling-house divers of the said fixtures, and damaging the walls of the said dwelling-house, and converting to his own use and wrongfully depriving the plaintiff of the said fixtures so removed as aforesaid.

For an injury to the reversion by obstructing lights: Metropolitan Association v. *Petch*, 27 L. J. C. P. 330; 5 C. B. N. S. 504; *by obstructing a right of way: Kidgill* v. *Moor*, 9 C. B. 364; *by cutting down trees: Cotterill* v. *Hobby*, 4 B. & C. 465.

For digging holes and spoiling the surface of the land, under an alleged right of working stone quarries: Rogers v. *Taylor*, 26 L. J. Ex. 203; 1 H. & N. 706.

By a reversioner against his own tenant for opening a new door in the house: Young v. *Spencer*, 10 B. & C. 145.

By a reversioner against the occupier of the adjoining land for building a house with eaves which discharged rain-water on the land of the plaintiff: Tucker v. *Newman*, 11 A. & E. 40.

By a reversioner for pulling down the eaves of a house and so preventing the rain-water from dropping on the adjoining premises as it of right ought to have done: Bathishill v. *Reed*, 25 L. J. C. P. 290; 18 C. B. 696.

By a reversioner for an injury to the right to divert a stream for the purposes of irrigation by removing a dam placed to divert it: Greenslade v. *Halliday*, 6 Bing. 379.

For other counts by reversioners: see "Lights," p. 302; *"Support,"* p. 351; *"Waste,"* p. 361; *"Watercourses,"* p. 367.

For an Injury to a Reversionary Property in Goods (b).

That the plaintiff was the owner of certain goods, that is to say, household furniture, let to hire for a certain time to *G. H.*, who had the possession thereof under such letting to hire, the reversionary property and interest in the said goods then belonging to the plaintiff; and the defendant injured the plaintiff's said reversionary property and interest in the said goods by wrongfully damaging

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still lie for the damage done in removing them. (*Hare* v. *Horton*, 5 B. & Ad. 715.)

(*b*) The owner of a future or reversionary interest in goods cannot, in general, sue for a conversion, or for trespass to the goods, but must sue in respect of the injury to his reversionary interest. (See *ante*, "*Conversion*," p. 253, and *post*, "*Trespass*," p. 356.) Actual damage to the reversionary interest of the plaintiff must be proved in order to support the action. (*Tancred* v. *Allgood*, 28 L. J. Ex. 362; 4 H. & N. 438; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231; *Mears* v. *London and South-Western Ry. Co.*, 31 L. J. C. P. 220.) A mere sale of the goods, not in market overt, and without a delivery of them to the purchaser and user of them by him, is not an injury to the reversionary property in the goods. *Ib.*

and breaking the said goods, and converting the same to his own use.

Like counts: Tancred v. *Allgood*, 28 L. J. Ex. 362; 4 H. & N. 438; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231; *Mears* v. *London and South-Western Ry. Co.*, 31 L. J. C. P. 220.

SEDUCTION. See *ante*, "*Master and Servant*," p. 312.

SHERIFF (*a*).

Count against a Sheriff for not levying under a Writ of Fi. Fa.

That the plaintiff, on the —— day of ——, A.D. ——, in the Court of —— at Westminster, by the judgment of the said court recovered

(*a*) Actions for default of duty in the office of sheriff must be brought against the high-sheriff, though the default is occasioned by the under-sheriff or bailiff. (*Cameron* v. *Reynolds*, Cowp. 403.)

The sheriff is liable for every irregularity or default done under colour of process (*Gregory* v. *Cotterell*, 25 L. J. Q. B. 33; 5 E. & B. 571), whether done by his bailiffs or their agents (*ib.*); but not for what is done beyond the scope of the process, unless subsequently adopted by the sheriff (*Underhill* v. *Wilson*, 6 Bing. 697; *Crowder* v. *Long*, 8 B. & C. 598); nor for what is done after the bailiff's authority is terminated by a *supersedeas* (*Brown* v. *Copley*, 7 M. & G. 558); nor for what is done by the bailiff with the authority of the execution creditor (*Crowder* v. *Long*, 8 B. & C. 598); nor for what is done by a bailiff specially appointed by the execution creditor (*Alderson* v. *Davenport*, 13 M. & W. 42; *Ford* v. *Leche*, 6 A. & E. 699).

Actions against the sheriff for breach of duty can in general only be maintained in respect of actual damage, as an actual delay of the plaintiff's suit. (*Wylie* v. *Birch*, 4 Q. B. 577; *Williams* v. *Mostyn*, 4 M. & W. 145; *Randell* v. *Wheble*, 10 A. & E. 719; and see 5 & 6 Vict. c. 98, s. 31; and *Moore* v. *Moore*, 27 L. J. C. 385, as to the amount of damages.)

An exception occurs in actions for an escape on final process, or for default in arresting on final process, in which actions the plaintiff is entitled to nominal damages, although no actual damage be proved. (See the cases, *post*, p. 346.)

An action will not lie against the sheriff for arresting a person privileged from arrest by reason of his attending a court of justice or other similar ground. (*Magnay* v. *Burt*, 5 Q. B. 381; and see *Watson* v. *Carroll*, 4 M. & W. 592; *Phillips* v. *Naylor*, 3 H. & N. 14; 27 L. J. Ex. 222; 4 H. & N. 565; and *ante*, "*Malicious Prosecution*," p. 306.)

When the sheriff had jurisdiction to grant replevins, he was liable to an action for refusing to grant replevin of goods at the suit of the person whose goods were taken. (*Sabourin* v. *Marshall*, 3 B. & Ad. 440.) He was also liable to an action at the suit of the person who had taken the goods for granting replevin without taking a replevin bond (*R.* v. *Lewis*, 2 T. R. 617); and for taking a replevin bond with insufficient sureties. (*Tesseyman* v. *Gildart*, 1 B. & P. N. R. 292.) But by the Act 19 & 20 Vict. c. 108 (to amend the Acts relating to the county courts), ss. 63, 64, the powers and responsibilities of the sheriff with respect to replevin bonds and replevins are taken away, and the registrar of the county court is empowered, according to the Act, to approve of replevin bonds and to grant replevins. (See *ante*, "*Replevin Bonds*," p. 204; "*Replevin*," p. 338.)

against *G. H.* £——; and thereupon the plaintiff, on the —— day of ——, A.D. ——, sued out of the said court a writ of fieri facias upon the said judgment directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that [he should omit not by reason of any liberty of his said county, but that he should enter the same, and] of the goods and chattels of the said *G. H.* in his bailiwick, he should cause to be made £——, which the plaintiff lately in the said court of —— recovered against the said *G. H.*, whereof the said *G. H.* was convicted, together with interest upon the said sum at the rate of £4 per centum per annum from the —— day of ——, A.D. ——, on which day the judgment aforesaid was entered up, and that he should have that money with such interest as aforesaid before her said Majesty [*or* her justices *or* her barons of the Exchequer] at Westminster immediately after the execution thereof to be rendered to the plaintiff, and that he should do all such things as by the statute passed in the second year of her said Majesty's reign he was authorized and required to do in that behalf, and in what manner he should have executed the said writ he should make to appear to her said Majesty [*or* her said justices, *or* her said barons of the Exchequer] at Westminster immediately after the execution thereof, and that he should have there then the said writ; and the said writ was duly indorsed with a direction to the said sheriff to levy £—— and interest thereon at £4 per cent. from the —— day of ——, A.D. ——, besides sheriffs' poundage, officers' fees, and other expenses of the execution; and the plaintiff caused the said writ so indorsed to be delivered to the defendant, as and being the sheriff of —— aforesaid, to be executed; and at the time of the delivery of the said writ as aforesaid and afterwards during a reasonable time in that behalf, goods and chattels of the said *G. H.* were within the said bailiwick of the defendant, and the defendant then had notice thereof, and could and ought to have levied thereout the money and interest so indorsed on the said writ; yet the defendant, being such sheriff as aforesaid, did not nor would levy the said money and interest, and made default in the execution of the said writ; whereby the plaintiff was delayed in recovering the said money and interest, and is likely to lose the same.

A like count; Lewis v. *Alcock*, 3 M. & W. 188.

A like count stating the subsequent bankruptcy of the execution debtor, whereby the plaintiff lost the benefit of the execution: Pike v. *Stephens*, 12 Q. B. 465.

A like count where there were other writs previous to the plaintiff's; Cocker v. *Musgrove*, 9 Q. B. 223.

Count against a Sheriff for a False Return of Nulla Bona to a Writ of Fi. Fa. after Levying.

That the plaintiff, on the —— day of ——, A.D. ——, in the Court of —— at Westminster, by the judgment of the said court recovered against *G. H.* £——; and thereupon the plaintiff, on the —— day of ——, A.D. ——, sued out of the said court a writ of fieri facias upon the said judgment directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that [*here set out the writ as in the preceding form*]; and the said writ was duly indorsed

[*here set out the indorsement as in the preceding form*]; and the plaintiff caused the said writ so indorsed to be delivered to the defendant, as and being the sheriff of —— aforesaid, to be executed; and the defendant, as and being such sheriff as aforesaid, by virtue of the said writ duly levied of the goods and chattels of the said *G. H.* in his bailiwick the money and interest so indorsed on the said writ; yet the defendant had not the said money and interest so levied as aforesaid before [the Queen herself, *or* the said justices, *or* the said barons, *as the case may be*], according to the exigency of the said writ, nor has the defendant paid the said money and interest to the plaintiff; and the defendant, as and being such sheriff as aforesaid, falsely returned to the said court upon the said writ that the said *G. H.* had not any goods or chattels in the defendant's bailiwick whereof he could cause to be made the money and interest so indorsed on the said writ as aforesaid, or any part thereof; whereby the plaintiff is deprived of the means of obtaining the said money and interest, and the same are still unpaid.

Like counts: Stubbs v. *Lainson*, 1 M. & W. 728; *Drewe* v. *Lainson*, 11 A. & E. 529; *Wright* v. *Lainson*, 2 M. & W. 739; *Heenan* v. *Evans*, 3 M. & G. 398.

Count against a sheriff for levying only a part of the debt after seizing goods sufficient to levy the whole, and for a false return of the amount of the levy: Slade v. *Hawley*, 13 M. & W. 757.

Count for not selling, and for a false return alleging that the sheriff had seized the goods, and that they remained in his hands for want of buyers: Pitcher v. *King*, 5 Q. B. 758; *Rowe* v. *Ames*, 6 M. & W. 747; *Wylie* v. *Birch*, 4 Q. B. 566; *Levy* v. *Hale*, 29 L. J. C. P. 127.

For a false return that rent was due to the landlord of the premises where goods were seized, and that the execution creditor had notice thereof, but had not paid it: Cocker v. *Musgrove*, 9 Q. B. 223.

Count against a sheriff for neglecting to sell goods seized within a reasonable time after a writ of venditioni exponas: Jacobs v. *Humphrey*, 2 C. & M. 413.

For neglecting to sell the goods seized until the judgment debtor became bankrupt (under the former bankrupt law): Aireton v. *Davis*, 9 Bing. 740; *Gore* v. *Lloyd*, 12 M. & W. 463.

Count against the sheriff for delay in executing a writ of possession in ejectment: *Mason* v. *Paynter*, 1 Q. B. 974.

Count by the judgment debtor against the sheriff for a loss occasioned by the negligent sale of the plaintiff's goods taken under a fi. fa.: Phillips v. *Bacon*, 9 East, 298.

Count by the judgment debtor against the sheriff for a trespass by remaining in a leasehold house an unreasonable time after execution and sale under the writ: Playfair v. *Musgrove*, 14 M. & W. 239.

Against the Sheriff for not arresting on Mesne Process (a).

That *G. H.* was indebted to the plaintiff in a sum exceeding £20, and the plaintiff brought an action against him in the court of —— at Westminster for the recovery of the said debt; and thereupon the plaintiff, according to the statute in such case made and provided, and all things necessary in that behalf having happened and been done, procured from a judge of one of the superior courts at Westminster a special order of the said judge in the said action directing the said *G. H.* to be held to bail for £——; and in pursuance of the said order the plaintiff sued out of the said court of —— in the said action a writ of capias directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that he should [omit not by reason of any liberty in his bailiwick, but that he should enter the same and] take the said *G. H.* if he should be found in the said bailiwick, and him safely keep until he should have given to the said sheriff bail, or should have made deposit with the said sheriff according to law in the said action at the suit of the plaintiff, or until he should by other lawful means be discharged from the custody of the said sheriff, and that on execution of the said writ the said sheriff should deliver a copy thereof to the said *G. H.*, and that immediately after the execution thereof the said sheriff should return the said writ to her Majesty's said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas], together with the manner in which he should have executed the same and the day of the execution thereof, or if the same should remain unexecuted, then that he should so return the same at the expiration of one calendar month from the date thereof, or sooner, if he should be thereto required by order of the said court or by any judge thereof; and the said writ was duly indorsed for bail for £——; and the plaintiff caused the said writ so indorsed to be delivered to the defendant, as and being the sheriff of —— aforesaid, to be executed; and at the time of the delivery of the said writ as aforesaid, and afterwards during a reasonable time in that behalf, the said *G. H.* was within the said bailiwick of the defendant, and the defendant then had notice thereof, and could and ought to have taken the said *G. H.* by virtue of the said writ; yet the defendant, being such sheriff as aforesaid, did not nor would take the said *G. H.*, and made default in the execution of the said writ; and the said *G. H.* did not cause special bail to be put in for him in the said action according to the exigency of the said writ; whereby the plaintiff was and is delayed in the recovery of his said debt and the costs of bringing the said action, and is likely to lose the same.

Like counts: Williams v. *Griffith*, 3 Ex. 584; *Randell* v. *Wheble*, 10 A. & E. 719; *Brown* v. *Jarvis*, 1 M. & W. 704.

Against the Sheriff for not Arresting on Final Process.

That the plaintiff, on the —— day of ——, A.D. ——, in the Court of —— at Westminster, by the judgment of the said court recovered against *G. H.* £——; and thereupon the plaintiff, on the —— day

(a) This action cannot be maintained without stating and proving actual damage consequent upon the negligence of the sheriff. (*Brown* v. *Jarvis*, 1 M. & W. 704; *Randell* v. *Wheble*, 10 A. & E. 719.)

of ——, A.D. ——, sued out of the said court a writ of capias ad satisfaciendum upon the said judgment directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that he should [omit not by reason of any liberty in his said county, but that he should enter the same and] take the said *G. H.* if he should be found in the bailiwick of the said sheriff, and him safely keep so that the said sheriff should have his body before her said Majesty [*or* her justices, *or* her barons of the Exchequer] at Westminster immediately after the execution thereof, to satisfy the plaintiff £——, which the plaintiff lately in the said court recovered against the said *G. H.*, whereof the said *G. H.* was convicted, together with interest upon the said sum at the rate of £4 per centum per annum from the —— day of ——, A.D. ——, on which day the judgment aforesaid was entered up, and that the said sheriff should have there then the said writ; and the said writ was duly indorsed with a direction to the said sheriff to levy £—— and interest thereon, at £4 per cent. from the —— day of ——, A.D. ——, besides sheriff's poundage, officers' fees, and other expenses of the said execution; and the plaintiff caused the said writ so indorsed to be delivered to the defendant, as and being the sheriff of —— aforesaid, to be executed; and at the time of the delivery of the said writ as aforesaid, and afterwards during a reasonable time in that behalf, the said *G. H.* was within the said bailiwick of the defendant, and the defendant then had notice thereof, and could and ought to have taken the said *G. H.* by virtue of the said writ; yet the defendant, being such sheriff as aforesaid, did not nor would take the said *G. H.*, and made default in the execution of the said writ; whereby the plaintiff was and is delayed in the recovery of the money and interest so indorsed on the said writ as aforesaid, which are still unpaid, and the plaintiff is likely to lose the same.

Like counts: Clifton v. *Hooper*, 6 Q. B. 468; *Hooper* v. *Lane*, 27 L. J. Q. B. 75 (*a*).

For an Escape on Mesne Process (b).

That *G. H.* was indebted to the plaintiff in a sum exceeding £20, and the plaintiff brought an action against him in the court of —— at Westminster for the recovery of the said debt; and thereupon the plaintiff, according to the statute in such case made and provided, and all things necessary in that behalf having happened and been done, procured from a judge of one of the superior courts of law at Westminster a special order of the said judge in the said ac-

(*a*) The plaintiff is entitled to recover nominal damages in this action, although no actual loss or damage can be proved. (See the above cases.)

(*b*) In this action the declaration must allege the pendency of a suit at the time of the making of the judge's order to hold to bail. (*Williams* v. *Griffith*, 3 Ex. 584; *Barnes* v. *Keane*, 15 Q. B. 75.)

The defendant is entitled to a particular of the escape sued for. (*Davis* v. *Chapman*, 1 N. & P. 699; *Webster* v. *Jones*, 7 D. & R. 774.)

Actual damage is necessary to maintain this action, and must be stated in the declaration (*Randell* v. *Wheble*, 10 A. & E. 719); but delay in the plaintiff's suit is sufficient. (*Brown* v. *Jarvis*, 1 M. & W. 704; *Williams* v. *Mostyn*, 4 M. & W. 145.) As to the amount and measure of damages, see *Moore* v. *Moore, in re Mozley*, 27 L. J. C. 385.

tion directing the said *G. H.* to be held to bail for £——; and in pursuance of the said order the plaintiff sued out of the said Court of —— in the said action a writ of capias directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that [*here set out the writ as in the form ante*, p. 344]; and the said writ was duly indorsed for bail for £——; and the plaintiff caused the said writ so indorsed to be delivered to the defendant, as and being the sheriff of —— aforesaid, to be executed; and the defendant, as and being such sheriff as aforesaid, by virtue of the said writ took the said *G. H.* and had and detained him in the custody of the defendant, at the suit of the plaintiff in the said action; yet the defendant, without the consent and against the will of the plaintiff, and without any legal cause or authority, voluntarily suffered the said *G. H.* to escape out of the said custody of the defendant; and the said *G. H.* did so escape, and the said *G. H.* did not cause special bail to be put in for him in the said action according to the exigency of the said writ; and by reason of the premises the plaintiff was and is delayed in the recovery of his said debt and the costs of bringing the said action, and is likely to lose the same.

Like counts: Rogers v. *Jones*, 7 B. & C. 86; *Contant* v. *Chapman*, 2 Q. B. 771.

Against the Sheriff for an Escape on Final Process (*a*).

That the plaintiff, on the —— day of ——, A.D. ——, in the Court of —— at Westminster, by the judgment of the said court, recovered against *G. H.* £——; and thereupon the plaintiff, on the —— day of ——, A.D. ——, sued out of the said court a writ of capias ad satisfaciendum upon the said judgment, directed to the sheriff of ——, whereby her Majesty the Queen commanded the said sheriff that [*here set out the writ as in the form, ante*, p. 345]; and the said writ was duly indorsed [*here set out the indorsement as in the form, ante*, p. 345]; and the plaintiff caused the said writ so indorsed to be delivered to the defendant as and being the sheriff of —— aforesaid to be executed, and the defendant, as and being such sheriff as aforesaid, by virtue of such writ, took the said *G. H.* and had and detained him in the custody of the defendant in execution for the said

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(*a*) By the 5 & 6 Vict. c. 98, s. 31, it is enacted that "If any debtor in execution shall escape out of custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape." Before this statute an action of debt lay against the sheriff for an escape on final process, to recover the sum for which the prisoner was arrested.

An action against the sheriff for an escape on final process is maintainable without special damage being alleged or proved. (*Williams* v. *Mostyn*, 4 M. & W. 145; *Clifton* v. *Hooper*, 6 Q. B. 468.)

The measure of damages in this action is the value of the custody of the debtor at the time of the escape, without deduction on account of anything which the plaintiff might have obtained by diligence after the escape (*Arden* v. *Goodacre*, 11 C. B. 371; *Hemming* v. *Hale*, 29 L. J. C. P. 137; 7 C. B. N. S. 487); but payment of the debt and costs after the escape may be given in evidence in mitigation of damages (*Hemming* v. *Hale*, 7 C. B. N. S. 487, 500).

sum and interest so indorsed on the said writ, and for the said costs and expenses; yet the defendant, without the consent and against the will of the plaintiff, and without any legal cause or authority, voluntarily suffered the said *G. H.* to escape out of the custody of the defendant; whereby the plaintiff lost and has been deprived of the said sum and interest, and the costs of execution so indorsed on the said writ as aforesaid, and was otherwise injured.

A like count against the sheriff of Middlesex: Hemming v. *Hale*, 7 C. B. N. S. 487.

Like counts against sheriffs: Bromfield v. *Jones*, 4 B. & C. 380; *Merry* v. *Chapman*, 10 A. & E. 516; *Lane* v. *Chapman*, 11 A. & E. 966; *Thomas* v. *Hudson*, 14 M. & W. 353.

Count against the bailiff of an ancient liberty for an escape on final process: Jackson v. *Hill*, 10 A. & E. 477.

Count for a wrongful discharge of the debtor: Hodges v. *Paterson*, 26 L. J. Ex. 223.

By a Landlord against the Sheriff for the Removal of Goods taken in Execution against the Tenant, without the Rent due being paid (8 Anne, c. 14, s. 1) (a).

That *G. H.* was tenant to the plaintiff of a messuage leased by the plaintiff to the said *G. H.* for [a term of years, *or* from year to year, *as the case may be,*] at the yearly rent of £——, payable quarterly, and £—— of the said rent for one year of the said tenancy was due and in arrear; and thereupon the defendant, as and being the sheriff of ——, under a writ of fieri facias against the goods and chattels of the said *G. H.*, sued out of the Court of —— at the suit of *J. K.*, and directed to the sheriff of ——, took the goods and chattels of the said *G. H.* being in the said messuage [and being of greater value than the said rent so in arrear as aforesaid]; and afterwards and before the removal of the said goods and chattels, the plaintiff gave notice to the defendant, as and being such sheriff as aforesaid, of the said rent being so due and in arrear, and requested him not to remove the said goods and chattels from the said messuage unless the said arrears of rent should be first paid; yet the defendant afterwards, under colour of the said writ, wrongfully removed the said goods and chattels from the said messuage without the said arrears of rent being first paid or satisfied, contrary to the statute in such case made and provided, and the said arrears of rent are still unpaid.

Like counts: Thurgood v. *Richardson*, 7 Bing. 428; *Reed* v. *Thoyts*, 6 M. & W. 410; *Riseley* v. *Ryle*, 11 M. & W. 16; *Smallman* v. *Pollard*, 6 M. & G. 1001; *Forster* v. *Cookson*, 1 Q. B. 419.

Count by a sheriff against his deputy for a default of duty in the execution of the office, for which the plaintiff was sued and had to pay damages: Bowdon v. *Hall*, 4 Q. B. 840.

Count by a sheriff against an attorney who had sued out a writ of

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(a) As to this action, see Archbold's Land. & Ten. p. 247; 1 Chit. Pr. 11th ed. 641; and see 7 & 8 Vict. c. 96, s. 67.

ca. sa. for fraudulently directing him to take the wrong person: Evans v. *Collins*, 5 Q. B. 804.

By the sheriff against the execution creditor for pointing out the wrong goods to be taken under a fi. fa.: Humphreys v. *Pratt*, 5 Bligh, N. S. 154: *Childers* v. *Wooler*, 29 L. J. Q. B. 129.

Shooting.

Count for Disturbance of a Right of Shooting.

(*Venue local.*) That the plaintiff was possessed of and entitled to the exclusive right and liberty of shooting and killing game by himself and his servants, in upon and throughout certain land called ——, and the defendant disturbed the plaintiff's said right by shooting and killing game on the said land.

Like counts: Earl of Lonsdale v. *Rigg*, 25 L. J. Ex. 73; 11 Ex. 654; *Bruce* v. *Helliwell*, 5 H. & N. 609.

Count for a trespass to plaintiff's right of free warren: Lord Dacre v. *Tebb*, 2 W. Bl. 1151.

Slander. See *ante*, "*Defamation*," p. 262.

Slander of Title (*a*).

Count for advertising that mines about to be sold by the plaintiff were subject to an adverse claim, whereby he was prevented from selling them: Rowe v. *Roach*, 1 M. & S. 304.

(*a*) *Slander of title.*]—This action lies to recover compensation for special damage sustained by reason of the speaking or writing and publishing of slander of the plaintiff's title to property. No action lies unless special damage has been sustained. (*Malachy* v. *Soper*, 3 Bing. N. C. 371.)

The statement constituting the slander must be false; it must have been spoken or published maliciously, and must have occasioned the damage. A statement made *bonâ fide* and under a reasonable belief of its truth, by a person having an interest in the matter, is not actionable. (*Rowe* v. *Roach*, 1 M. & S. 304; *Pitt* v. *Donovan*, 1 M. & S. 639; *Smith* v. *Spooner*, 3 Taunt. 246; *Pater* v. *Baker*, 3 C. B. 831, 868; *Brook* v. *Rawl*, 4 Ex. 521.)

The declaration must set out the exact words containing the slander, with proper innuendos, if necessary, to point out their meaning, as in actions for libel or slander of character. (*Gutsole* v. *Mathers*, 1 M. & W. 495; see *ante*, p. 265.) As this action is brought in respect of special damage only, it is immaterial whether the words are written or spoken. (*Malachy* v. *Soper*, 3 Bing. N. C. 371; where see also as to the particularity required in stating the special damage, *Ib.* 384.)

A statement depreciating the quality of goods offered for sale by a person, although not conveying any imputation of fraud or misrepresentation against him, is likewise actionable in respect of any special damage occasioned thereby, but not otherwise. (*Evans* v. *Harlow*, 5 Q. B. 624.)

For writing a letter impugning the plaintiff's title to an estate, whereby a purchaser refused to complete a contract to purchase: Pitt v. *Donovan*, 1 M. & S. 639.

For claiming title to an estate put up to auction, whereby the sale was prevented: Smith v. *Spooner*, 3 Taunt. 246.

For slander of title of estates put up to auction, whereby the sale was prevented: Millman v. *Pratt*, 2 C. & B. 486; *Pater* v. *Baker*, 3 C. B. 831.

For asserting of leasehold premises put up for sale that the covenants were broken, whereby persons were deterred from bidding: Brook v. *Rawl*, 4 Ex. 521.

For asserting that goods offered for sale by auction were stolen, whereby persons were deterred from bidding: Gutsole v. *Mathers*, 1 M. & W. 495.

For publishing that goods of the plaintiff advertised by him for sale by auction belonged to the defendant, whereby the sale was prevented: Carr v. *Duckett*, 29 L. J. Ex. 468; 5 H. & N. 783.

Stock (*a*).

Count by a holder of public stock against the Bank of England for refusing to pay the dividends thereon: Foster v. *Bank of England*, 8 Q. B. 689; *Partridge* v. *Bank of England*, 9 Q. B. 396.

By a holder of public stock against the Bank of England for refusing to transfer the stock to a purchaser: Stracy v. *Bank of England*, 6 Bing. 754.

Against the Bank of England for transferring the plaintiff's stock without his authority, and refusing to pay the dividends: Davis v. *Bank of England*, 2 Bing. 393; 5 B. & C. 185.

By the executor of a deceased proprietor of stock against the Bank of England for refusing to transfer the stock, and for not paying the dividends due thereon: Coles v. *Bank of England*, 10 A. & E. 437.

Against the East India Company for refusing to transfer stock as required by the holder: Gregory v. *East India Co.*, 7 Q. B. 199.

By an administrator de bonis non *with the will annexed against the East India Company for not transferring stock standing in the name of the deceased, and for not paying dividends: Venables* v. *East India Co.*, 2 Ex. 633.

Support (*b*).

(*a*) In actions for refusing to transfer stock or to pay dividends, a claim of a mandamus under the C. L. P. Act, 1854, might in general be added. (See *ante*, "*Mandamus*," p. 309.)

(*b*) Where the surface of land belongs to one person and the subjacent soil and minerals to another, the owner of the surface is entitled to a natural

For taking away the Subjacent Support of the Plaintiff's Land by Mining (a).

(*Venue local.*) That the plaintiff was possessed of certain pasture and arable land; and the defendant wrongfully excavated and worked certain coal-mines under the said land, and dug for and got and took away coals and earth out of the said mines without leaving proper or sufficient support for the said land of the plaintiff, whereby the said land of the plaintiff sank and gave way.

Like counts: Humphries v. *Brogden*, 12 Q. B. 740; *Smart* v. *Morton*, 25 L. J. Q. B. 260; 5 E. & B. 30; *Adams* v. *Lloyd*, 27 L. J. Ex. 499; 3 H. & N. 351.

For taking away the Adjacent and Subjacent Support of the Plaintiff's Land and the Buildings thereon.

(*Venue local.*) That the plaintiff was possessed of land with houses

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right of support by the subjacent strata. (*Humphries* v. *Brogden*, 12 Q. B. 739; *Smart* v. *Morton*, 24 L. J. Q. B. 260; 5 E. & B. 30.) The owner of land is also entitled to a right of support for his land by the adjacent land as a natural incident to his property, independently of grant or prescription. (*Nicklin* v. *Williams*, 23 L. J. Ex. 335; 10 Ex. 259; *Bonomi* v. *Backhouse*, 27 L. J. Q. B. 378; S. C. in error, 28 L. J. Q. B. 378.) These rights, however, may be qualified or altogether abandoned by express grant, reservation or covenant, or by prescription. (*Rowbotham* v. *Wilson*, 6 E. & B. 593; in H. L. 30 L. J. Q. B. 49.)

The natural right of the owner of land to support from the adjacent land only extends to the land in its natural unencumbered state, and not with the additional weight of buildings erected thereon. (*Dodd* v. *Holme*, 1 A. & E. 493; *Humphries* v. *Brogden*, 12 Q. B. 743; *Wyatt* v. *Harrison*, 3 B. & Ad. 871.) But a right to support for the additional weight of buildings on the land may, it is said, be acquired, as an easement, by twenty years' uninterrupted enjoyment or otherwise (*ib.*; *Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 28 L. J. Ex. 250; 4 H. & N. 186; *Hunt* v. *Peake*, 29 L. J. C. 785; *North-Eastern Ry. Co.* v. *Elliott*, 22 L. J. C. 808); and mere possession is sufficient to support an action against a stranger who interferes with the support of a building by the adjacent land. (*Bibby* v. *Carter*, 28 L. J. Ex. 182; 4 H. & N. 153; *Jeffries* v. *Williams*, 5 Ex. 792.) Similar right of support by the subjacent strata may be acquired for buildings. (*Rogers* v. *Taylor*, 27 L. J. Ex. 173; 2 H. & N. 828.) But although the owner of land may be entitled to a right of support for the natural surface, without any right of support for additional buildings, he cannot acquire a prescriptive right to support for buildings independently to a right of support for the surface. (*Rowbotham* v. *Wilson*, 25 L. J. Q. B. 362; 27 L. J. Q. B. 61; 8 E. & B. 123.) The owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected thereon, provided the weight of the buildings did not cause the injury. (*Brown* v. *Robins*, 28 L. J. Ex. 250; 4 H. & N. 186; *Stroyan* v. *Knowles*, *Hamer* v. *Knowles*, 30 L. J. Ex. 102; 6 H. & N. 454.)

As to the right of support for buildings from the adjoining buildings, see *post*, p. 351, n. (*a*.)

(*a*) In this count it is not necessary to state expressly the right to support, because it is naturally incident to the right to the surface. An acquired right to support for buildings, etc., must be expressly stated, as in the following precedents. (*Jeffries* v. *Williams*, 5 Ex. 792; *Peyton* v. *London*, 9 B. & C. 725.)

and other buildings erected and standing thereon, and was entitled to have the said land, houses, and buildings supported by the land adjacent thereto, and by the soil and minerals under the said land, houses, and buildings of the plaintiff; and the defendant wrongfully dug out and removed the said land adjacent to the said land, houses, and buildings of the plaintiff, and the said soil and minerals under the same, without leaving proper and sufficient support for the said land, houses, and buildings of the plaintiff; whereby the same sank and gave way, and the said houses and buildings were weakened, cracked, and injured.

Like counts: Nicklin v. *Williams*, 10 Ex. 259; *Rogers* v. *Taylor*, 27 L. J. Ex. 173; 2 H. & N. 828; *Richards* v. *Rose*, 9 Ex. 218; *Smart* v. *Morton*, 5 E. & B. 30; *Brown* v. *Robins*, 28 L. J. Ex. 250.

Like counts at the suit of a reversioner: Harris v. *Ryding*, 5 M. & W. 60; *Hilton* v. *Granville*, 5 Q. B. 701; *Roberts* v. *Haines*, 25 L. J. Q. B. 353; 7 E. & B. 625; *Bonomi* v. *Backhouse*, 27 L. J. Q. B. 378; *Bibby* v. *Carter*, 28 L. J. Ex. 182; 4 H. & N. 153; *Hamer* v. *Knowles*, 30 L. J. Ex. 102.

Count for digging the support from the foundations of wine-vaults of the plaintiff, whereby they fell in, and the wine-vaults and the wine were destroyed: Trower v. *Chadwick*, 3 Bing. N. C. 334; 6 Bing. N. C. 1.

For taking away from the Plaintiff's House the Support to which it was entitled from the adjoining House (*a*).

(*Venue local.*) That the plaintiff was possessed of a house adjoining a certain other house and certain walls thereto belonging, and was entitled to support for his said house from the said adjoining house and the said walls; and the defendant deprived the plaintiff of the said support for his said house from the said adjoining house and the said walls [by wrongfully taking down and removing the last-mentioned house and walls without shoring or propping up, or otherwise securing or taking reasonable and proper precautions to support and secure the said house of the plaintiff]; whereby the said house of the plaintiff fell in and was destroyed, and the goods of the plaintiff then being therein were damaged and broken, and the plaintiff incurred expense in procuring another house, and in removing and

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(*a*) As between adjoining houses, there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property. (*Chauntler* v. *Robinson*, 4 Ex. 163.) Where houses are built by the same owner adjoining one another and depending upon one another for support, and are afterwards conveyed to different owners, there exists by a presumed grant and reservation a right of support to each house from the adjoining ones. (*Richards* v. *Rose*, 9 Ex. 218.) Where adjoining houses are built by the separate owners of adjacent lands, a similar right, it is said, may be acquired by twenty years' user. (*Hide* v. *Thornborough*, 2 C. & K. 250; but see *Solomon* v. *Vintners' Co.*, 4 H. & N. 585; 28 L. J. Ex. 370.) No such right can be thus acquired by the owner of a house against the owners of the houses beyond the adjoining one. (*Solomon* v. *Vintners' Co.*, *supra.*)

repairing his said goods, and in removing the ruins of his said house, and in rebuilding the same.

Like counts: Langford v. *Woods*, 7 M. & G. 625; *Browne* v. *Windsor*, 1 C. & J. 20; *Hide* v. *Thornborough*, 2 C. & K. 250; *South Metrop. Cemetery Co.* v. *Eden*, 16 C. B. 42; *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Solomon* v. *Vintners' Co.*, 28 L. J. Ex. 370; 4 H. & N. 585.

Counts for injuries to buildings arising from negligence in pulling down an adjoining house; negligently making sewers in the adjoining ground, etc.: see ante, "*Negligence,*" p. 322.

Trade Marks (*a*).

Count by a Manufacturer against the Defendant for Manufacturing and Selling Goods marked with the Plaintiff's Trade-mark.

That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, carried on the business of a [cutler], and manufactured and sold for profit large quantities of [knives], which he was accustomed to mark with a certain trade-mark of the plaintiff, that is to say, with the words "——" [or with a figure of ——, *describing the trade-mark used by the plaintiff according to the fact*] in order to denote that they were manufactured by him, and to distinguish them from articles of the same kind manufactured by other persons; and the plaintiff enjoyed great reputation with the public on account of the good quality of his said [knives], and made great profits by the sale of them; and the defendant thereupon wrongfully and fraudulently, and without the consent and against the will of the plaintiff, manufactured a great quantity of [knives], and caused them to be marked with the words "——" [or with a figure of ——, *describing the mark used by the defendant*] in imitaion of the said trade-mark so used by the plaintiff as aforesaid, and in order to cause it to be believed that the last-mentioned [knives] were manufactured by the plaintiff, and the defendant wrongfully and fraudulently sold the last-mentioned [knives] as and for [knives] manu-

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(*a*) An action lies by a manufacturer of goods against a person who affixes to his own goods the known and accustomed mark of the former, and sells them upon a fraudulent representation that they are of the manufacture which such mark would denote them to be (*Rodgers* v. *Nowill*, 5 C. B. 109); and such action is maintainable without any allegation or proof of special damage. (*Ib.*; *Blofeld* v. *Payne*, 4 B. & Ad. 410.) In actions for using the trade-marks or name of another for the purpose of selling goods as his, a claim may be made for an injunction to restrain such use. (*Ante,* "*Injunction,*" p. 201; and see Story's Eq. Jur. 5th ed. § 951; *Farina* v. *Silverlock*, 26 L. J. C. 11; *Collins Company* v. *Reeves*, 28 L. J. C. 56.) An injunction will lie against a person who innocently infringes another's trade-mark. (*Millington* v. *Fox*, 3 M. & Cr. 338; and see *Dixon* v. *Fawcus*, 30 L. J. Q. B. 137; *Burgess* v. *Hill*, 26 Beav. 244; 28 L. J. C. 356.)

One of the two joint owners of a trade-mark may sue separately in respect of the injury to his separate interest by infringement. (*Dent* v. *Turpin*, 30 L. J. C. 495.)

factured by the plaintiff; whereby the plaintiff was prevented from selling a great quantity of the said [knives] manufactured by him, and was injured in his reputation in his said business by reason of the said [knives] so manufactured and sold by the defendant being inferior in quality to those manufactured by the plaintiff.

Like counts: Sykes v. *Sykes*, 3 B. & C. 541; *Blofeld* v. *Payne*, 4 B. & Ad. 410; *Crawshay* v. *Thompson*, 4 M. & G. 357; *Morison* v. *Salmon*, 2 M. & G. 385; *Rodgers* v. *Nowill*, 5 C. B. 109.

Count for using the name or title of a banking business which had been previously assumed by the plaintiff: Lawson v. *Bank of London*, 25 L. J. C. P. 188; 18 C. B. 84.

Count for the penalty for using the name or marks of a patentee of a patented article without his consent (5 & 6 *Will. IV. c.* 83, *s.* 7); *Myers* v. *Baker*, 28 L. J. Ex. 90.

Count for fraudulently procuring the plaintiff to manufacture goods with the trade-mark of another manufacturer, whereby the plaintiff was subjected to a Chancery suit for an injunction: Dixon v. *Fawcus*, 30 L. J. Q. B. 137.

Trespass: I. to the Person (*a*).

Count for an Assault and Battery.

That the defendant assaulted and beat the plaintiff [*state special damage, if any, which may be as follows*]: whereby the plaintiff be-

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(*a*) *Trespass to the person.*]—Trespass to the person consists in any direct injury to the person, as a battery, an assault, or an imprisonment.

A *battery* is the unlawful beating of another. The least touching of another's person hostilely or against his will is a battery. (*Rawlings* v. *Till*, 3 M. & W. 28; 3 Bl. Com. 120.) It includes the striking another with a missile. (*Pursell* v. *Horn*, 8 A. & E. 602.) The act may be a trespass although unintentional (*Covell* v. *Laming*, 1 Camp. 497); but if it be the result of accident or of some agency over which the defendant had no control, so as not to be his act, it is not a trespass. (*Gibbons* v. *Pepper*, 1 L. Raym. 38; *Hall* v. *Fearnley*, 3 Q. B. 919; *Wakeman* v. *Robinson*, 1 Bing. 213.) Touching a person for the purpose of calling his attention is not a battery. (*Wiffin* v. *Kincard*, 2 B. & P. N. R. 471; *Coward* v. *Baddeley*, 28 L. J. Ex. 260; 4 H. & N. 478.)

An *assault* is an attempt at a battery; a menacing attitude, as holding up a hand or stick to strike a person who is within reach thereof at the time, constitutes an assault. (3 Bl. Com. 120; *Stephens* v. *Myers*, 4 C. & P. 349; *Read* v. *Coker*, 13 C. B. 850.) A mere verbal threat, if followed by actual damage through fear thereof, as by the interruption of a man's business, will, it is said, support an action of trespass. (3 Bl. Com. 120.)

An *imprisonment* consists in the restraint of the liberty of a person, as by confining him in a prison or within walls, or by forcibly detaining him in an open place. (3 Bl. Com. 127.) It must amount to a total restraint of his liberty for some period, however short. A partial obstruction of his will, as the prevention of his going in one direction or in all directions but one, does not constitute an imprisonment. (*Bird* v. *Jones*, 7 Q. B. 742, Lord Denman, C. J.,

came sick and wounded, and was for a long time unable to transact his business, and incurred expense for nursing and medical attendance.

Counts for a trespass in driving against the plaintiff with a carriage: Leame v. *Bray*, 3 East, 593; *Wakeman* v. *Robinson*, 1 Bing. 213; *Hall* v. *Fearnley*, 3 Q. B. 919; *M'Laughlin* v. *Pryor*, 4 M. & G. 48; *and see ante*, "*Negligence*," p. 318.

Counts against a corporation for a trespass to the person: Chilton v. *London & Croydon Ry. Co.*, 16 M. & W. 212; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314; *Manning* v. *Eastern Counties Ry. Co.*, 12 M. & W. 237.

Count for an Assault, Battery, and False Imprisonment. (*C. L. P. Act*, 1852, *Sched. B.* 26.)

That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office.

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dissentiente.) A restraint by authority submitted to may be an imprisonment, although the person is not actually touched. (*Grainger* v. *Scott*, 4 Bing. N. C. 212; per Willes, J., *Warner* v. *Riddiford*, 4 C. B. N. S. 180, 204.) If a person order another, as a policeman, to take a third person, it is an imprisonment by the first as well as by the policeman, and the ground for an action of trespass against him. (*Wheeler* v. *Whiting*, 9 C. & P. 262: *Stonehouse* v. *Elliott*, 6 T. R. 315.) If he merely states the facts to a policeman (or other person), who takes the party on his own responsibility, or if he procures a magistrate to issue a warrant for taking him, it is no imprisonment or trespass by him. Where, however, a person puts the law in motion maliciously and without reasonable or probable cause, it is the ground of an action (on the case) for malicious prosecution. (*Barber* v. *Rollinson*, 1 C. & M. 330; see *ante*, p. 303.) As to the distinction between an action for a trespass and for a malicious prosecution, and the counts for each, see *Chivers* v. *Savage*, 25 L. J. Q. B. 85; 5 E. & B. 697; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Guest* v. *Warren*, 9 Ex. 379.

An action will lie for false imprisonment under colour of legal process where the process has been set aside for irregularity, etc. (See *post*, ch. 6, "*Trespass.*") Both the party and his attorney are in general liable for the trespass committed in such cases. (*Bates* v. *Pilling*, 6 B. & C. 38; *Codrington* v. *Lloyd*, 8 A. & E. 449; *Jarmain* v. *Hooper*, 6 M. & G. 827; *Collett* v. *Foster*, 26 L. J. Ex. 412; 2 H. & N. 356; see such actions, *Ib.*; and *Blanchenay* v. *Burt*, 4 Q. B. 707; *Prentice* v. *Harrison*, 4 Q. B. 852.) So also an action will lie for a trespass committed under legal process where the judgment and execution have been set aside as against good faith. (*Brown* v. *Jones*, 15 M. & W. 191; and see *Cash* v. *Wells*, 1 B. & Ad. 375.)

An act done by the command of the Crown is not trespass (*Buron* v. *Denman*, 2 Ex. 167); nor is the act of a judge acting judicially within his jurisdiction. (*Dicas* v. *Lord Brougham*, 6 C. & P. 249.)

By the C. L. P. Act, 1852, s. 49, the statement of acts of trespass having been committed with force and arms, and against the peace of our Lady the Queen, formerly inserted in declarations in trespass, are to be omitted.

Count for an Assault and False Imprisonment, stating special Damage.

That the defendant assaulted the plaintiff, and imprisoned him, and kept him in prison for a long time; whereby the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business, and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment.

Count for a False Imprisonment on a Charge of Felony.

That the defendant assaulted the plaintiff and gave him into custody to a policeman, and compelled him to go to a police station, and there caused him to be imprisoned, and to be kept in prison for a long time, until he was brought before a police magistrate upon a false charge then made by the defendant, that he had committed a felony [*if the plaintiff was remanded by the magistrate, state the facts as ante*, p. 308 (*a*)]; whereby, etc. [*state any special damage as in last count*].

Like counts: Wright v. *Court*, 4 B. & C. 596; *Huntley* v. *Simson*, 27 L. J. Ex. 134; 2 H. & N. 600.

Count for a false imprisonment on a charge of obtaining goods by false pretences, whereby the plaintiff lost his situation: Mathews v. *Biddulph*, 3 M. & G. 390.

Count against a justice of the peace for false imprisonment: Groome v. *Forrester*, 5 M. & S. 314; *Rogers* v. *Jones*, 3 B. & C. 409; *Davis* v. *Capper*, 10 B. & C. 28; *Cave* v. *Mountain*, 1 M. & G. 257; *Mills* v. *Collett*, 6 Bing. 85; *see ante*, "*Justice of the Peace*," p. 300.

For assaulting and imprisoning the plaintiff as a lunatic: Eliot v. *Allen*, 1 C. B. 18; *Fletcher* v. *Fletcher*, 28 L. J. Q. B. 134.

Count by Husband and Wife for an Assault on the Wife (*b*).

(*Commence with the form ante*, p. 17.) That the defendant assaulted and beat the said *C.*, then being the wife of the said *A. B.*, whereby she became sick and wounded, and for a long time suffered great pain of body and mind.

(*a*) A remand being the act of the magistrate cannot be charged as a substantive trespass, but would form the ground of a count for malicious prosecution; see *ante*, p. 308; *Holtum* v. *Lotun*, 6 C. & P. 726; *Lock* v. *Ashton*, 12 Q. B. 871.

(*b*) The husband cannot in this count claim any damage which in law accrues to himself alone, as the loss of the comfort or services of his wife, or the expenses incurred in curing her. (*Dengate* v. *Gardiner*, 4 M. & W. 5.) To recover these he must formerly have brought a separate action in his own name alone, but he may now add a count on such causes of action as in the next form. (C. L. P. Act, 1852, s. 40; *ante*, p. 294; see *Stone* v. *Jackson*, 16 C. B. 199.)

Count by Husband alone for Loss occasioned by an Assault on his Wife.

That the defendant assaulted and beat *C.*, then being the wife of the plaintiff; whereby she became sick and wounded, and the plaintiff was deprived of her comfort and services for a long time, and incurred expense for nursing and medical attendance.

Count against Husband and Wife for an Assault by the Wife.

(*Commence with the form ante, p.* 17.) That the defendant *G.* assaulted the plaintiff [and threw boiling water upon him, and scalded him and injured his clothes].

A like count: Pursell v. *Horn*, 8 A. & E. 602.

Trespass for assaulting and taking away the plaintiff's son: Gilbert v. *Schwenck*, 14 M. & W. 488.

TRESPASS: II. TO GOODS (*a*).

Count for a Trespass in taking and carrying away Goods.

That the defendant seized and took the plaintiff's goods, that is

(*a*) *Trespass to goods.*]—The ground of this action is an actual taking of, or any direct and immediate injury to, goods. (*Leame* v. *Bray*, 3 East, 593; *Fouldes* v. *Willoughby*, 8 M. & W. 540.) An indirect interference with the owner's possession, as preventing him from having access to his goods, or locking the door of the defendant's room in which they are, will not support the action. (*Hartley* v. *Moxham*, 3 Q. B. 701; and see *Thorogood* v. *Robinson*, 6 Q. B. 769.) In order to constitute a trespass, it is not necessary that the act should be intentional. (*Covell* v. *Laming*, 1 Camp. 497; *Colwill* v. *Reeves*, 2 Camp. 575, 576.) Trespass will lie for goods taken under an illegal distress, as where no rent is due, or where the goods were privileged, but not for irregularities in dealing with goods under a distress, see *ante*, "*Distress*," p. 275. Trespass will lie for beating the plaintiff's dog or horse. (*Dand* v. *Sexton*, 3 T. R. 37; and see *Slater* v. *Swan*, 2 Str. 872.) If a bailee of goods for a special purpose destroys them, it is a trespass. (Co. Lit. 57 *a*; and see *Countess of Salop* v. *Crompton*, Cro. Eliz. 777, 784.) One tenant in common of a chattel may maintain trespass against another for a destruction of it, see *ante*, "*Conversion*," p. 254.

The plaintiff in this action must at the time of the trespass have the present possession of the goods (*Ward* v. *Macauley*, 4 T. R. 489; *Young* v. *Hichens*, 6 Q. B. 606: and see *ante*, p. 253), either actual or constructive (*Smith* v. *Milles*, 1 T. R. 475, 480); or a legal right to the immediate possession, which is said in the case of personal property to draw to it the possession. (*Balme* v. *Hutton*, 9 Bing. 471, 477; 2 Wms. Saund. 47 *b*.) A trustee having the legal property may sue, though the beneficial interest and possession are in another. (*Wooderman* v. *Baldock*, 8 Taunt. 676.) But a special or temporary right to the present possession, as that of a hirer of goods, or of a carrier, or bailee who has had actual possession, is sufficient to support an action of trespass. (*Colwill* v. *Reeves*, 2 Camp. 575; 2 Wms. Saund. 47 *e*.) And the person having such special property in the goods, may maintain an action of trespass even against the absolute owner for a wrongful taking of the goods by the latter, and recover damages in respect of his

to say, iron, hops, and household furniture [*or as the case may be*], and carried away the same, and disposed of them to his own use.

Count for taking the plaintiff's goods being his stock in trade, stating special damage: Brewer v. *Dew*, 11 M. & W. 625.

Count for a Trespass in taking and impounding Cattle.

That the defendant seized and took the plaintiff's cows and bullocks and impounded them, and kept them impounded for a long time; whereby the plaintiff was deprived of the use of the said cows and bullocks during that time, and incurred expense in feeding them, and in getting them restored to him, and was also prevented from selling them at —— fair, as he otherwise would have done, and the said cows and bullocks are diminished in value to the plaintiff.

Count for a trespass in taking and distraining sheep, and putting them in an improper pound, whereby some died: Gates v. *Bayley*, 2 Wils. 313; *Wilder* v. *Speer*, 8 A. & E. 547; *Bignell* v. *Clark*, 29 L. J. Ex. 257; 5 H. & N. 485.

For taking and ill-using the plaintiff's dog, whereby it died: Bunch v. *Kennington*, 1 Q. B. 679; *Dand* v. *Sexton*, 3 T. R. 37.

For taking the plaintiff's game: Churchward v. *Studdy*, 14 East, 249.

For taking the plaintiff's slaves in a foreign country: Buron v. *Denman*, 2 Ex. 167.

For stopping and driving away the plaintiff's waggon: Holding v. *Pigott*, 7 Bing. 465.

For taking away a tombstone from a churchyard, erected by the plaintiff: Spooner v. *Brewster*, 3 Bing. 136.

For taking and carrying away the materials of a bridge: Harrison v. *Parker*, 6 East, 154.

Count for Trespasses to Goods by or against Executors, Administrators, Husband and Wife, Assignees of Bankrupts, etc.

Counts by or against such parties may be readily framed from the declarations given *ante*, "*Conversion*," pp. 256–258.

limited interest. (*Brierley* v. *Kendall*, 17 Q. B. 936; and see *Turner* v. *Hardcastle*, 31 L. J. C. P. 193.)

The fact of possession is *primâ facie* evidence of the right to possession, and therefore sufficient to maintain the action against a wrongdoer who cannot show a better right, or authority under a better title. (*Elliott* v. *Kemp*, 7 M. & W. 312.) Hence it is not open to a defendant in an action of trespass to set up a *jus tertii*, under which he does not justify, to rebut the title of the plaintiff who was in actual possession at the time of the injury complained of. But where the plaintiff relies upon a mere right of property without actual possession in fact, the defendant may rebut his title by showing a *jus tertii*. As to the distinction between this action and the action for a wrongful conversion, see *ante*, p. 253.

By the 3 & 4 Will. IV. c. 42, s. 29, in all actions of trespass *de bonis asportatis* the jury may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the seizure.

Trespass: III. to Land (*a*).

Count for Trespass to Land. (C. L. P. Act, 1852, Sched. B. 25.)

(*Venue local.*) That the defendant broke and entered certain land of the plaintiff called the Big Field, and depastured the same with cattle.

(*a*) *Trespass to land.*]—A trespass to land is an entry upon or any direct and immediate act of interference with the possession of the land; it is commonly described by the term breaking and entering. A trespass may be committed by driving a nail into the plaintiff's wall (*Lawrence* v. *Obee*, 1 Stark. 22); or by placing anything against his wall (*Gregory* v. *Piper*, 9 B. & C. 591); or by shooting into the plaintiff's land (*Pickering* v. *Rudd*, 1 Stark. 56, 58; where see also as to shooting over plaintiff's land, or placing anything above and overhanging the land.) Where the plaintiff held apartments in the defendant's house as tenant of the defendant, and the defendant locked the outer door and refused the plaintiff access to the apartments, it was held that this was evidence of a breaking and entering of the apartments by the defendant. (*Lane* v. *Dixon*, 3 C. B. 776.)

An omission or nonfeasance by the defendant does not constitute a trespass, as an omission to take away his tithes from the plaintiff's land. (*Shapcott* v. *Mugford*, 1 L. Raym. 187; and see *Lawrence* v. *Obee*, 1 Stark. 22.) The continuance of a trespass is a fresh trespass, and is actionable in the same manner as the original commission of it. (*Holmes* v. *Wilson*, 10 A. & E. 503; and see *Battishill* v. *Reed*, 25 L. J. C. P. 290; 18 C. B. 696.)

A trespass is actionable though committed unintentionally or by mistake, as where the defendant mowed the plaintiff's grass by mistake for his own. (*Basely* v. *Clarkson*, 3 Lev. 37.) As to when the acts of a servant may be charged as the acts of his master, see *ante*, "*Master and Servant*," p. 313.

The subject of the trespass must be real and corporeal property; as land or houses; or the vesture of land or herbage or pasture, to the exclusive possession of which the plaintiff is entitled, although he may have no other interest in the land (Co. Lit. 4 *b*; *Crosby* v. *Wadsworth*, 6 East, 602; *Burt* v. *Moore*, 5 T. R. 329; and see *Cox* v. *Glue*, 5 C. B. 533); an exclusive right of cutting turf (*Wilson* v. *Mackreth*, 3 Burr. 1824); or an exclusive right of fishing or of free warren (*Smith* v. *Kemp*, Salk. 637; *Lord Dacre* v. *Tebb*, 2 W. Bl. 1151). An incorporeal right is not the subject of a trespass; as a right of common of pasture, or of fishing, or of digging turf, or a right of way, or a right to a pew or any easement annexed to land. (*Wilson* v. *Mackreth*, 3 Burr. 1824; *Mainwaring* v. *Giles*, 5 B. & Ald. 356, 361; *Bryan* v. *Whistler*, 8 B. & C. 288, 292.) The owner of the soil may maintain an action of trespass against a person entitled to rights over the surface for acts of trespass not justified by the exercise of such rights. (*Stammers* v. *Dixon*, 7 East, 200; *Earl Lonsdale* v. *Rigg*, 26 L. J. Ex. 196.) Thus the owner of land subject to a highway over it may maintain an action of trespass for any act amounting to a trespass upon it other than a user of it as a highway. (*Lade* v. *Shepherd*, 2 Str. 1004; and see *Goodtitle* v. *Alker*, 1 Burr. 133.) So the owner of land subject to a public market held thereon (*Mayor of Northampton* v. *Ward*, 1 Wils. 107). And the owner of the subsoil of land of which the surface belongs to another, may maintain an action for a trespass to the subsoil. (*Stammers* v. *Dixon*, 7 East, 200; *Cox* v. *Glue*, 5 C. B. 533.) The term "close" is often used to describe the place trespassed upon, and is applicable equally either to surface or subsoil, or to an open or an enclosed parcel of land; if the plaintiff charging a trespass to his close proves a sufficient interest in the *locus in quo* to maintain an action of trespass, though he fails to prove exclusive possession of the soil for all purposes, he is entitled to recover. (*Cox* v. *Glue*, 5 C. B. 533, 551; and see *Smith* v. *Royston*, 8 M. & W. 381.)

Count for Trespass to a River.

(*Venue local.*) That the defendant on divers days and times broke and entered certain land of the plaintiff covered with water called

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In order to maintain an action for this wrong the plaintiff must have a present possessory title. The owner legally entitled cannot maintain an action of trespass before entry (*Lichfield* v. *Ready*, 5 Ex. 939; *Turner* v. *Cameron Coal Co.*, 5 Ex. 932); but an actual entry will relate back to the time of the legal right to enter, so as to support an action for a preceding trespass (*Barnett* v. *Guildford*, 11 Ex. 19; *Anderson* v. *Radcliffe*, 29 L. J. Q. B. 128); and upon entry the rightful owner may maintain the action against a party previously in possession. (*Butcher* v. *Butcher*, 7 B. & C. 399.) Actual possession as owner is presumptive proof of property, and is sufficient against a mere wrongdoer who cannot show any better title or authority. (*Graham* v. *Peat*, 1 East, 244; *Purnell* v. *Young*, 3 M. & W. 288; *Pugh* v. *Roberts*, 3 M. & W. 458; *Matson* v. *Cook*, 4 Bing. N. C. 392; *Browne* v. *Dawson*, 12 A. & E. 624.) And it is not open to the defendant to set up a *jus tertii* to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right. The possession of a servant or agent is the possession of the owner (*Bertie* v. *Beaumont*, 16 East, 33); and seems not to be sufficient to entitle the servant to maintain trespass. (Per Byles, J., *White* v. *Bailey*, 30 L. J. C. P. 253, 256; 10 C. B. N. S. 227, 235.)

One joint tenant or tenant in common of land cannot maintain an action of trespass against another in respect of the exercise of any acts of ownership on the land by the latter, consistent with the right of the former (*Murtyn* v. *Knowllys*, 8 T. R. 145; *Cubitt* v. *Porter*, 8 B. & C. 257; and see Co. Lit. 200); but trespass lies by one tenant in common against another for an actual expulsion of the plaintiff from the land by the defendant (*Murray* v. *Hall*, 7 C. B. 441); or for digging up and carrying away the soil (*Wilkinson* v. *Haygarth*, 12 Q. B. 837); or for the occupation of a party wall to the exclusion of the plaintiff (*Stedman* v. *Smith*, 26 L. J. Q. B. 314); but not for pulling down a party wall for the purpose of rebuilding it. (*Cubitt* v. *Porter*, 8 B. & C. 257.)

The venue in this action is local, and must be laid in the county where the land is situate; but the cause may be tried in another county than that stated in the venue by a judge's order, a suggestion of which must be entered upon the record. (See *ante*, "*Change of Venue*," p. 2.) An action will not lie for a trespass to land out of the jurisdiction of the court. (*Doulson* v. *Matthews*, 4 T. R. 503.) By r. 18, T. T. 1853, in actions for trespass to land, the close or place in which, etc., must be designated in the declaration by name or abuttals or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the court or a judge may think reasonable. No other local description than that required by this rule is necessary in the body of the declaration; see r. 4, T. T. 1853, *ante*, p. 1. As to the degree of accuracy necessary in the description of the close, see *Webber* v. *Richards*, 1 Q. B. 439; *Lempriere* v. *Humphrey*, 3 A. & E. 181; *Roberts* v. *Karr*, 1 Taunt. 495. It is in general sufficient to show two abuttals of the close. (*North* v. *Ingamells*, 9 M. & W. 249.) It seems that an insufficient description cannot be objected to after pleading to it. (*Lempriere* v. *Humphrey*, 3 A. & E. 181; *Banks* v. *Angell*, 7 A. & E. 843; *Lethbridge* v. *Winter*, 2 Bing. 49.) The description must meet the state of the close at the time of the trespass. (*Humphrey* v. *London & N.-W. R. C.*, 22 L. J. Ex, 149.) See the modes of describing different kinds of property in the precedents and references given above.

Where, in a declaration for trespass to land, the plaintiff describes his land by name and the defendant pleads that the land so described in the declaration is his land, and it appears upon the evidence that both the

the river ——, being the bed and channel of the said river, and dug holes in the said land and took and carried away stones, gravel, and earth therefrom, and drove and fixed piles and stakes in the said land, and placed pipes therein; whereby the passage of the said river was obstructed and the water thereof was diverted.

Like counts: Duke of Beaufort v. *Vivian*, 21 L. J. Ex. 204; *Medway Navigation Co.* v. *Earl of Romsey*, 30 L. J. C. P. 236.

Count for breaking and entering a landing stage moored to a wharf on a river: Eastern Counties Ry. Co. v. *Dorling*, 5 C. B. N. S. 821; 28 L. J. C. P. 202.

For a trespass to a bridge: Harrison v. *Parker*, 6 East, 154.

For a trespass on the sea shore between high and low water mark: Blundell v. *Catterall*, 5 B. & Ald. 268.

Count for Trespass to a Mine.

(*Venue local.*) That the defendant on divers days and times broke and entered a close of the plaintiff called ——, and a mine of the plaintiff being under the surface of the said close, and dug shafts in the said close, and dug levels in the said mine, and dug and got out of the said mine a large quantity of coal of the plaintiff, and carried away the same and converted it to his own use.

Like counts: Morgan v. *Powell*, 3 Q. B. 278; *Keyse* v. *Powell*, 2 E. & B. 132; *Brain* v. *Harris*, 10 Ex. 908.

Count for Trespass to a Party Wall.

(*Venue local.*) That the defendant broke and entered a close of the plaintiff, called No. 401, Piccadilly, and a wall of the plaintiff then standing upon the said close, and broke down and destroyed a part of the said wall and took and carried away and converted to his own use a great quantity of the materials of the same, and built a house and chimney against and upon the said wall and deprived the plaintiff of the said wall, and kept him out of the possession and enjoyment thereof.

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plaintiff and the defendant have a piece of land of the same name, the plaintiff is nevertheless entitled to recover without a new assignment (*Cocker* v. *Crompton*, 1 B. & C. 489), because the defendant by pleading must be taken to know what close is meant, and the question is whether the close so described is or is not the close of the defendant. (Per Parke, B., 9 M. & W. 251.) So where the land is described by abuttals, and both the plaintiff and the defendant have land answering to the same description. (*Lempriere* v. *Humphrey*, 3 A. & E. 181; *Lethbridge* v. *Winter*, 2 Bing. 49.) If the plea by further particularizing the close to which his justification refers shows that it relates to a different close from that intended by the plaintiff, then the plaintiff must new assign. (See post, c. 6, "*New Assignment.*")

If it is probable that several trespasses may be proved, the declaration may allege "that the defendant on divers days and times" broke and entered the plaintiff's close, etc., charging several trespasses, and under such allegation the plaintiff may give evidence of distinct acts of trespass at different times. (1 Wms. Saund. 24 (1).)

Where the declaration alleged that the defendant on a certain day broke and entered the house of the plaintiff and "continued therein for a long space of time," it was held that evidence was admissible of distinct trespasses on several days. (*Percival* v. *Stamp*, 23 L. J. Ex. 25.)

Like counts: *Cubitt* v. *Porter*, 8 B. & C. 257; *Murly* v. *M'Dermott*, 8 A. & E. 138; *Stedman* v. *Smith*, 8 E. & B. 1; 26 L. J. Q. B. 314.

Count for a trespass to a growing crop of grass of the plaintiff: *Crosby* v. *Wadsworth*, 6 East, 602.

For a trespass to the plaintiff's exclusive right of cutting turf from a close: *Wilson* v. *Mackreth*, 3 Burr. 1824.

For a trespass to the subsoil of a close of the plaintiff where the possession of the surface was in another: *Cox* v. *Glue*, 5 C. B. 533.

Count for a trespass to a close of the plaintiff over which there was a highway: *Lade* v. *Shepherd*, 2 Str. 1004; *and see Goodtitle* v. *Alker*, 1 Burr. 133.

For a trespass on a piece of land enclosed from the side of a highway: *Brownlow* v. *Tomlinson*, 1 M. & G. 484.

For a trespass on the towing path of a canal: *Monmouthshire Canal Co.* v. *Hill*, 28 L. J. Ex. 283.

Count for a trespass to an exclusive right of shooting over a close: *see ante*, "*Shooting*," p. 348.

Count for a trespass to a several fishery: *see ante*, "*Fishery*," p. 288.

For a trespass in throwing down a weir of the plaintiff appurtenant to his fishery: *Williams* v. *Wilcox*, 8 A. & E. 314.

Count for a Trespass in Breaking and Entering the Plaintiff's Dwelling-house, and carrying away Goods and Expelling the Plaintiff (*a*).

(*Venue local.*) That the defendant broke and entered a dwelling-house of the plaintiff called ——, and stayed and made a noise and

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(*a*) *Pleading matters of aggravation.*]—In declarations alleging various acts in the same count, as breaking and entering a house, continuing there a stated period of time, taking and carrying away the plaintiff's goods, and converting them, assaulting and beating the plaintiff, and expelling him, etc., it is sometimes a question of great nicety to determine what acts are substantive trespasses, and what are mere matters of aggravation. (*Taylor* v. *Cole*, 1 Smith's L. C. 5th ed. 111; *Pritchard* v. *Long*, 9 M. & W. 666; *Kavanagh* v. *Gudge*, 7 M. & G. 316; *Pratt* v. *Pratt*, 2 Ex. 413; *Bush* v. *Parker*, 1 Bing. N. C. 72.) The defendant need not plead to matters of aggravation; he is compelled to answer only such parts of the declaration as are material and the gist of the action. But a plea to the whole count, omitting to answer a material trespass or cause of action, would be bad in substance. (1 Wms. Saund. 28 *b* (*k*).)

If the plaintiff in a doubtful case wishes to rely on particular acts as substantive causes of action, his safest course is to charge them in separate counts, as in *Twigg* v. *Potts*, 1 C. M. & R. 89; *Roberts* v. *Tayler*, 1 C. B. 117. If this is not done, and the defendant in pleading treats particular acts as substantive trespasses, he will afterwards be bound to consider them as such. (*Lane* v. *Dixon*, 3 C. B. 776; *Roberts* v. *Tayler*, *supra*.) If, in such a case, the defendant omits to plead to particular acts charged in the

disturbance therein for a long time, and broke open the doors of the said dwelling-house, and removed, took, and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them so expelled for a long time; whereby the plaintiff was prevented from carrying on his business, and incurred expense in procuring another dwelling-house for himself and family.

Count for a trespass in breaking and entering the plaintiff's apartments: *Lane* v. *Dixon*, 3 C. B. 776.

For a trespass in entering the plaintiff's house and continuing therein, and hindering his business: *Mayhew* v. *Suttle*, 4 E. & B. 347; *Percival* v. *Stamp*, 9 Ex. 167.

For entering the plaintiff's house to search for goods which the defendant charged the plaintiff with having stolen: *Bracegirdle* v. *Orford*, 2 M. & S. 77.

For a trespass in entering the plaintiff's house under an informal warrant obtained under the Small Tenements Act, 1 & 2 Vict. c. 47: *Delaney* v. *Fox*, 1 C. B. N. S. 166.

Count for breaking and entering the plaintiff's house and pulling it down whilst he and his family were within: *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Burling* v. *Read*, 11 Q. B. 904.

Count for a trespass in entering the plaintiff's house and taking away his stock in trade under an unfounded claim, stating special damage in his trade and credit: *Brewer* v. *Dew*, 11 M. & W. 625.

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declaration, the plaintiff may, by demurring to the plea, raise the question whether, on the construction of the declaration, those acts are substantive causes of action or matter of aggravation only; or where the act in question is sufficiently charged as a substantive cause of action, but its import is mistaken or restricted by the defendant, the plaintiff may new-assign the true cause of action or the excess for which he sues. (See *Taylor* v. *Cole*, 1 Smith's L. C. 5th ed. 111, notes; and see *post*, c. 6, "*New Assignment.*") The defendant may perhaps avoid the difficulty in pleading to such a declaration, by an application under the C. L. P. Act, 1852, s. 52, which enables the court or a judge to amend any pleading so framed as to prejudice or embarrass the opposite party.

In a count charging a trespass by entering a house and taking goods, the taking is a substantive trespass and not mere matter of aggravation. (*Pritchard* v. *Long*, 9 M. & W. 666.) In a count for a trespass by entering a house, and taking and converting goods, the conversion is mere matter of aggravation; and a plea to the whole count, which justifies only the entering and taking of the goods, is a good plea. (*Pratt* v. *Pratt*, 2 Ex. 413.) In a count for a trespass by entering the plaintiff's house, and expelling him therefrom, a plea justifying the entry is sufficient, and the expulsion is mere matter of aggravation. (*Taylor* v. *Cole*, 3 T. R. 292; 1 Smith's L. C. 5th ed. 111; and see *Kavanagh* v. *Gudge*, 7 M. & G. 316.) In a count charging a trespass in pulling down a house, it is mere matter of aggravation to state that the plaintiff was in it at the time. (*Perry* v. *Fitzhowe*, 8 Q. B. 757; *Burling* v. *Read*, 11 Q. B. 904.) So also the statement that an entry was forcible is mere matter of aggravation. (*Davison* v. *Wilson*, 11 Q. B. 890; and see *Newton* v. *Harland*, 1 M. & G. 644; *Harvey* v. *Brydges*, 14 M. & W. 437; *Pollen* v. *Brewer*, 7 C. B. N. S. 371.)

Count for Mesne Profits and the Costs of an Ejectment (*a*).

(*Venue local.*) That the defendant broke and entered a messuage and land of the plaintiff, that is to say [*it is usual to describe the premises as in the writ in ejectment, but if this does not give a sufficient local description within the* r. 18, T. T. 1853, *the name or abuttals or other description should be added, ante, p.* 359], and ejected the plaintiff from his possession thereof, and kept him so ejected for a long time, and during that time took and received to the use of the defendant all the issues and profits and the beneficial use and occupation of the said messuage and land; whereby the plaintiff during all that time lost and was deprived of the issues and profits and the beneficial use and occupation thereof, and was prevented from letting the same, and incurred great expense in recovering the possession of the said land and messuage.

Trover.

See *ante*, "*Conversion*," p. 253.

Warranty.

See *ante*, "*Fraud*," p. 289.

Waste (*b*).

Count for Voluntary Waste in a Dwelling-house.

(*Venue local.*) That the defendant was tenant to the plaintiff of a dwelling-house, and during the said tenancy wrongfully committed

(*a*) By the C. L. P. Act, 1852, s. 214, damages for mesne profits may be recovered at the trial of an ejectment at the suit of a landlord against a tenant, wherever it shall appear at the trial that such tenant has been served with due notice of trial, whether the defendant shall appear upon such trial or not. The enactment, however, provides that the claimant must first prove his right to recover possession of the premises, which he is not compelled to do where he proceeds only for possession under the writ, and the defendant does not appear. No notice of the intended claim for mesne profits need be given in the writ or issue. (*Smith* v. *Tett*, 9 Ex. 307.)

(*b*) *Waste.*]—The action of waste is given by the statute of Gloucester, 6 Edw. I. c. 5, whereby it lies "against him that holdeth by the law of England or otherwise for the term of life, or for term of years, or a woman that holdeth in dower." (2 Inst. 299.). There are two kinds of waste: viz. voluntary or commissive waste, and permissive waste; the former consisting in acts, as pulling down a house; the latter in omissions, as suffering a house to fall into decay. As to what acts and omissions constitute waste, see Co. Lit. 53 *a*, *b*; Cruise's Digest, tit. *Waste*. Where trees are excepted out of a lease and the tenant cuts them down, it is not waste, but a trespass. (*Goodright* v. *Vivian*, 8 East, 190.)

At common law the action for waste lay only against tenant by the cur-

waste to the said dwelling-house, by pulling down the fixtures, doors, and windows belonging to the same and affixed thereto, and carried away the said fixtures, doors, and windows, and disposed of the same to his own use.

A like count: Kinlyside v. *Thornton*, 2 Wm. Bl. 1111.

Count for waste in opening a new door: Young v. *Spencer*, 10 B. & C. 145.

Count by husband and wife for waste: see 2 Wms. Saund. 235 *a*, (n) 2.

Count for Permissive Waste in a Dwelling-house.

(*Venue local.*) That the defendant was tenant to the plaintiff of a

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tesy, tenant in dower, or guardian; but by the statute the action is given against lessee for life or years, or tenant *pur autre vie*, or against the assignee of tenant for life or years for waste done after the assignment. (2 Wms. Saund. 252; *Harnett* v. *Maitland*, 16 M. & W. 257, 262.) A tenant at will is not liable for permissive waste (*Harnett* v. *Maitland*, 16 M. & W. 257); and a tenant for years seems to be liable for waste only according to the terms of his tenancy. (1 Wms. Saund. 323 *d*; *Jones* v. *Hill*, 7 Taunt. 392; *Gibson* v. *Wells*, 1 B. & P. N. R. 290.) It is an implied term of a tenancy, in the absence of express agreement, that the tenant shall use the premises in a tenant-like manner (*Standen* v. *Chrismas*, 10 Q. B. 135, and see *ante*, "*Landlord and Tenant*," p. 172); so that a tenant of a farm must use it in a husband-like manner (*Powley* v. *Walker*, 5 T. R. 373; and see *ante*, p. 176); but the tenant is not impliedly liable for reasonable wear and tear. (*Torriano* v. *Young*, 6 C. & P. 8; and see *Martin* v. *Gilham*, 7 A. & E. 540.) Hence a tenant from year to year is not in general liable for permissive waste (*Torriano* v. *Young*, *supra*); and a tenant under a lease who has not covenanted to repair is not liable for permissive waste. (*Herne* v. *Bembow*, 4 Taunt. 764.) A tenant may be sued in an action in the above form for waste for which he is liable, notwithstanding he has covenanted with the plaintiff not to commit the waste complained of, and the plaintiff has also a remedy upon the covenant (*Kinlyside* v. *Thornton*, 2 Wm. Bl. 1111; *Torriano* v. *Young*, 6 C. & P. 8, 11); but an action of waste can lie only for that which would be waste if there were no covenant, and therefore proof of a mere breach of covenant not amounting to waste will not support the action. (*Jones* v. *Hill*, 7 Taunt. 392.)

In order to maintain this action, the plaintiff must have a vested interest in the reversion at the time when the waste was committed; thus, an heir cannot sue for waste done in the life of his ancestor. (2 Inst. 305; 2 Wms. Saund. 252; and see *Bacon* v. *Smith*, 1 Q. B. 345.) The action will not lie at the suit of one tenant in common against another. (*Martyn* v. *Knowllys*, 8 T. R. 145.) An action will lie at the suit of the reversioner for any act of commissive waste which is injurious to his reversion, whether committed by a stranger or by the tenant in possession. If committed by a stranger, he must sue for the injury to his reversion in the form *ante*, "*Reversion*," p. 338. The action cannot be maintained without proof of some damage to the reversion. (*Young* v. *Spencer*, 10 B. & C. 145.)

The declaration should state the kind of waste which is the subject of the action; and the plaintiff will not be allowed to give evidence of a kind of waste different from that alleged. Thus, under a charge of voluntary waste, the defendant cannot give evidence of permissive waste (*Martin* v. *Gilham*, 7 A. & E. 540); and in like manner where a declaration, framed in covenant, charged a breach by permitting waste, it was held not to be supported by proof of voluntary waste. (*Edge* v. *Pemberton*, 12 M. & W. 187; and see *Harris* v. *Mantle*, 3 T. R. 307.)

See further as to the action of waste, 2 Inst. 299; 2 Wms. Saund. 252.

dwelling-house for a term of —— years, from the —— day of ——, A.D. ——, and during the said tenancy wrongfully permitted waste to the said dwelling-house, by suffering the same to become and be ruinous and in decay in the doors, windows, and roofs of the said dwelling-house for want of needful and necessary repairing thereof.

Like counts: Gibson v. *Wells*, 1 B. & P. N. R. 290; *Bacon* v. *Smith*, 1 Q. B. 345; *Harnett* v. *Maitland*, 16 M. & W. 257.

For Voluntary Waste in Woods, Hedges, etc.

(*Venue local.*) That the defendant was tenant to the plaintiff of a farm, lands, and woods, and during the said tenancy wrongfully committed waste to the same; by felling, lopping, topping, and shrouding the trees of the plaintiff there growing and being, and by rooting up, breaking down, and destroying the bushes, hedges, and fences of the plaintiff there also growing and being; and the defendant wrongfully took and carried away the said trees and bushes, and the wood of the said trees, hedges, and fences respectively, and disposed of the same to his own use.

For cutting down fruit-trees in a garden: Martin v. *Gilham*, 7 A. & E. 540.

For erecting fences and enclosing land, and ploughing up pasture land: Queen's College v. *Hallett*, 14 East. 489.

Count in the nature of waste by a reversioner against the lessee of mines for working them in an improper manner: Marker v. *Kenrick*, 13 C. B. 188.

Watercourses (*a*).

For an Injury to the Plaintiff's Natural Right to the Flow of a Stream of Water by diverting the Water.

(*Venue local.*) That the plaintiff was possessed of certain land, and was entitled to the flow of a stream or watercouse to and

(*a*) *Watercourses.*]—The proprietor of land has a right to have the natural streams of water which run through his land run in their natural course and in their natural state, according to the maxim of law *aqua currit, et debet currere ut currere solebat.* (*Wood* v. *Waud*, 3 Ex. 748, 775.) He has also a right to use it as it passes. (*Ib.*; *Mason* v. *Hill*, 5 B. & Ad. 17; *Embrey* v. *Owen*, 6 Ex. 369.) These rights are not founded on a right of property in the water, nor on prescription, but they exist *ex jure naturæ* as incident to the property in the land. (*Ib.*; *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 299; *Sampson* v. *Hoddinott*, 26 L. J. C. P. 148; 1 C. B. N. S. 590.) All riparian proprietors have these rights, and the right of each is subject to the same rights in the others. (*Embrey* v. *Owen*, 6 Ex. 369.) As to the manner and extent of the use of running water to which the riparian proprietors are naturally entitled, see the cases of *Wood* v. *Waud*, *Embrey* v. *Owen*, *Sampson* v. *Hoddinott*, *supra.*

Besides the rights to flowing water arising *ex jure naturæ* as above mentioned, other rights may be acquired in excess of the natural rights of a riparian proprietor and in derogation of the rights of the other riparian proprietors situated above or below on the stream, by grant or by prescription. (*Bealey* v. *Shaw*, 6 East. 214; *Acton* v. *Blundell*, 12 M. & W. 353;

through the said land, and the defendant obstructed and diverted the water of the said stream or watercourse from the said land of the plaintiff.

Like counts: Northam v. *Hurley*, 1 E. & B. 665; *Insole* v. *James*,

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Carlyon v. *Lovering*, 26 L. J. Ex. 251; 1 H. & N. 784.) Such rights are within the Prescription Act, 2 & 3 Will. IV. c. 71, s. 2.

A riparian proprietor is entitled to an action for any injury to the above natural or acquired rights; as by diverting the stream, or by abstracting the water, or by fouling the water. And he is entitled to nominal damages in such an action, in order to prevent the injury, although no actual damage be in fact sustained. (*Wood* v. *Waud*, *Embrey* v. *Owen*, *supra*.)

Defined streams of water flowing underground are, it is said, subject to the same rules as streams on the surface. (*Chasemore* v. *Richards*, 29 L. J. Ex. 81, 85.)

With respect to water, whether on the surface or underground, not running in defined streams, no similar rights subsist. Such water is the absolute property of the owner of the soil of which it forms part. (*Rawstron* v. *Taylor*, 25 L. J. Ex. 33; 11 Ex. 369; *Broadbent* v. *Ramsbotham*, 25 L. J. Ex. 115; 11 Ex. 602; *Chasemore* v. *Richards*, 26 L. J. Ex. 393; 2 H. & N. 168; S. C. in H. L. 29 L. J. Ex. 81.)

A right to discharge an artificial stream of water into another person's land may be acquired by grant or prescription; and the extent of the right will be determined by user or otherwise. A proprietor of land having acquired a right to discharge pure water into his neighbour's land, has no right to discharge water in a polluted state, and would be liable to an action for so doing. (*Wood* v. *Waud*, 3 Ex. 748; *Magor* v. *Chadwick*, 11 A. & E. 571.) Under this head may be included the right to discharge water and drainage through channels, gutters and drains, on the adjacent property, as in *Thomas* v. *Thomas*, 2 C. M. & R. 35; also the right to discharge the rain-water from the eaves of buildings, as in *Battishill* v. *Reed*, 25 L. J. C. P. 290. In the case of an artificial stream no right to compel the continuance of its flow is necessarily acquired by riparian proprietors against the person discharging it (*Arkwright* v. *Gell*, 5 M. & W. 203; *Greatrex* v. *Hayward* 22 L. J. Ex. 137; 8 Ex. 291); nor against the proprietors through whose land it flows. (*Wood* v. *Waud*, 3 Ex. 748.)

A natural stream of water flowing in an ancient artificial channel is in general subject to the same rules of law as the natural stream in its natural channel. (*Beeston* v. *Weate*, 25 L. J. Q. B. 115; 5 E. & B. 986.)

By the Prescription Act, 2 & 3 Will. IV. c. 71, s. 5, the right may be stated in the declaration generally without setting forth the nature of the title, whether by grant or prescription. If, however, the title is set forth, it must be stated accurately. (*Fentiman* v. *Smith*, 4 East. 107; *Coryton* v. *Lithebye*, 2 Wms. Saund. 113 *a*; *Hewlins* v. *Shippam*, 5 B. & C. 221; *Whaley* v. *Laing*, 27 L. J. Ex. 422; 2 H. & N. 476.) A possessory title is in general sufficient evidence to support the right. (*Whaley* v. *Laing*, 27 L. J. Ex. 422; 2 H. & N. 476; *Northam* v. *Bowden*, 11 Ex. 70.) Where the right was claimed by reason of the possession of a mill, and the evidence showed only a natural right to the flow of the stream through the premises, the variance was held to be material, as it might affect the defence. (*Frankum* v. *Earl Falmouth*, 2 A. & E. 452.)

The right should be described accurately in respect of its extent, with all the restrictions and qualifications, if any, to which it is subject. It would be immaterial for the right to be stated more narrowly than it really exists, provided the statement is wide enough to cover the disturbance complained of. (*Duncan* v. *Louch*, 6 Q. B. 904; *Tebbutt* v. *Selby*, 6 A. & E. 786.) But if the right be stated too largely, the plaintiff will fail in supporting his count by the evidence, and cannot (without an amendment) have a verdict

1 H. & N. 243; *Hall* v. *Swift*, 4 Bing. N. C. 381; *Attorney-General* v. *Bristol Waterworks Co.*, 10 Ex. 884.

Count for Penning back the Water of a Stream on to Plaintiff's Land.

(*Venue local.*) That the plaintiff was possessed of certain meadow land adjoining the river ——, and was entitled to have the said river flow by and away from the said land; and the defendant on divers days and times penned back the water of the said river, and obstructed the same, so that it could not flow by and away from the said land; whereby the water of the said river overflowed and flooded the said land, and remained thereon for a long time, and spoilt the herbage thereof, and the plaintiff was deprived of the use of the said land, and incurred expense in removing the water therefrom, and the said land was diminished in value.

Counts for causing a watercourse to flow with unusual violence: *Williams* v. *Morland*, 2 B. & C. 910.

For diminishing the force of the stream: *Blagrave* v. *Bristol Waterworks Co.*, 26 L. J. Ex. 57; 1 H. & N. 369.

Against a waterworks company for taking more water than they were authorized to take: *Penarth Harbour Co.* v. *Cardiff Waterworks Co.*, 29 L. J. C. P. 230; 7 C. B. N. S. 816.

For throwing materials into the stream which lodged on the bed of the stream in the plaintiff's land: *Murgatroyd* v. *Robinson*, 26 L. Q. B. 233; 7 E. & B. 391; *Carlyon* v. *Lovering*, 26 L. J. Ex. 251; 1 H. & N. 784.

Count for Fouling the Water of a Stream running through the Plaintiff's Land.

That the plaintiff was possessed of certain pasture-land, and was entitled to have the use of the water of a stream which flowed through the same for his cattle to drink and for other purposes, and the defendant wrongfully polluted and disturbed the water of the said stream by throwing and causing to flow into the same noxious substances and fluids, so that it became foul, noxious, and unfit for the plaintiff's cattle to drink; whereby divers of the plaintiff's cattle became sick and disordered, and the plaintiff incurred expense in curing them, and he was compelled to drive his cattle to a distance for water, and lost the use of the water of the said stream, and his said land was injured and lessened in value.

A like count: *Moore* v. *Webb*, 1 C. B. N. S. 673.

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on a traverse of the right, although he prove sufficient to maintain an action; (*Brunton* v. *Hall*, 1 Q. B. 792) unless the allegation of the right is divisible, when it would seem that the plaintiff may have a limited verdict for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles* v. *Groves*, 12 Q. B. 721; and see *ante*, "*Common*," p. 250.) Where the right is exercised to a greater extent than the party is entitled to, the other party is justified in preventing the excess, though in doing so he prevents the entire exercise of the right; as where the plaintiff has a right to use a drain for clean water and discharges foul water therein, the defendant may obstruct the drain altogether in order to prevent the passage of the foul water. (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34.)

Count by a reversioner for discharging into the stream water impregnated with noxious mineral matter: Wright v. *Williams*, 1 M. & W. 77.

Count for polluting an artificial watercourse: Whaley v. *Laing*, 26 L. J. Ex. 327; 27 L. J. Ex. 422; 2 H. & N. 476.

For Diverting the Water from a Mill. (*C. L. P. Act*, 1852, *Sched. B.* 30.) (*a*)

(*Venue local.*) That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

Like count: Dudden v. *Clutton Union*, 26 L. J. Ex. 146; 1 H. & N. 627.

Count for penning back the water below so as to impede the plaintiff's mill: Saunders v. *Newman*, 1 B. & Ald. 258.

For Obstructing the Plaintiff's Right to use the Water for Irrigation.

(*Venue local.*) That the plaintiff was possessed of certain meadows, and was entitled to take and use a portion of the water of a certain stream for watering the said meadows, and the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by obstructing and diverting the said stream.

A like count: Beeston v. *Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115.

A like count by a reversioner: Sampson v. *Hoddinott*, 1 C.B.N.S. 590.

For disturbing the plaintiff's exclusive use of a covered sewer through the defendant's land: Lee v. *Stevenson*, 27 L. J. Q. B. 263; *Cooper* v. *Pegg*, 16 C. B. 264.

For obstructing a drain through which refuse water and drainage were discharged from the plaintiff's house: Fitzsimons v. *Inglis*, 5 Taunt. 534; *Bell* v. *Twentyman*, 1 Q. B. 766; *Thomas* v. *Thomas*, 2 C. M. & R. 35; *Cawkwell* v. *Russell*, 26 L. J. Ex. 35; *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369; *Pyer* v. *Carter*, 1 H. & N. 916; 26 L. J. Ex. 258.

For keeping a badly constructed drain on the defendant's land, whereby an overflow of the contents was discharged on to the plaintiff's premises: Alston v. *Grant*, 3 E. &. B. 128.

Count for Obstructing the Plaintiff's Right to discharge the Rain-water from the Eaves of a Building on to the adjacent Land.

That the plaintiff was possessed of a dwelling-house, and was entitled to have the rain-water that did and might from time to time

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(*a*) The right alleged in this count is an acquired right, it being claimed in respect of the mill; it would not be supported by evidence of the mere natural flow of the water irrespective of an acquired right for the use of the mill. (*Frankum* v. *Earl Falmouth*, 2 A. & E. 452.)

naturally fall on a certain roof, part of the said dwelling-house, drop from the eaves of the said roof upon the land adjoining the said dwelling-house, and to have the said eaves project over the said land; and the defendant wrongfully removed the said eaves, and by building on the said land close to and higher than the said roof, prevented the said roof from having such eaves as aforesaid projecting over the said land, and prevented such rain-water as aforesaid from dropping from the said eaves upon the said land, and penned back the same upon the said roof; whereby the plaintiff's said dwelling-house was rendered wet and unhealthy, and was permanently injured and lessened in value.

Like count by a reversioner: Battishill v. *Reed*, 25 L. J. C. P. 290; 18 C. B. 696, 698.

Count against the Occupier of the adjoining Land for wrongfully discharging Rain-water from his Eaves on to the Plaintiff's Land.

That the defendant wrongfully erected and kept erected near to and abutting upon land of the plaintiff a certain building, with the eaves thereof projecting over the said land of the plaintiff, so as to cause and thereby caused the rain-water from time to time falling on the said building to run therefrom and drop on the said land; whereby the same was rendered wet and useless to the plaintiff.

Like count: Fay v. *Prentice*, 1 C. B. 828.

Like count by a reversioner: Battishill v. *Reed*, 18 C. B. 696, 698.

A like count by a reversioner: Tucker v. *Newman*, 11 A. & E. 40; *and see ante, "Reversion," p.* 340.

Ways (*a*).

For Obstructing a Private Right of Way.

(*Venue local.*) That the plaintiff was possessed of a messuage, and

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(*a*) *Ways.*]—Rights of way are *public* or *private*. An individual cannot maintain an action for the obstruction of a public way unless he has suffered a particular and special damage from the obstruction. (See "*Nuisance*," *ante*, p. 324; *Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281; *Rose* v. *Groves*, 5 M. & G. 613; *Simmons* v. *Lillystone*, 8 Ex. 431.) The owner of a private right of way would be entitled to maintain an action and recover nominal damages for an obstruction, although no special or substantial damage was suffered thereby.

An action will lie at the suit of a reversioner for an obstruction to a right of way, where the obstruction is of a permanent character and injurious to his reversion (*Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *Midland Ry. Co.*, 10 C. B. N. S. 287; and see *ante*, "*Reversion*," p. 339); but an action will not lie at the suit of a reversioner for a mere exercise of a right of way not injurious to the reversion, although done with the intent to establish an easement upon the land. (*Baxter* v. *Taylor*, 4 B. & Ad. 72; and see *ante*, p. 339.)

In pleading a private right of way, the right may be stated generally without setting forth the nature of the title. (2 & 3 Will. IV. c. 71, s. 5; and see *ante*, "*Commons*," p. 249; "*Watercourses*," p. 366.) Qualified rights of way must be pleaded according to the facts. (*Brunton* v. *Hall*,

was entitled to a right of way from the said messuage over a certain close to a public highway, and back again from the said public highway over the said close to the said messuage, for himself and his servants on foot and with horses, cattle, and carriages at all times of the year, and the defendant wrongfully obstructed the said way.

Like counts: South Metropolitan Cemetery Co. v. *Eden*, 16 C. B. 42; *Benge* v. *Swaine*, 15 C. B. 784; *Worthington* v. *Gimson*, 29 L. J. Q. B. 116.

Count for obstructing a right of way to which the plaintiff was entitled for special purposes, as taking in coals, repairing pipes belonging to his house, etc.: Hinchcliffe v. *Earl Kinnoul*, 5 Bing. N. C. 1.

For obstructing a right of way over a close appurtenant to the houses in a certain street, being a close appropriated as a pleasure-ground for the inhabitants: Duncan v. *Louch*, 6 Q. B. 904.

Count for Obstructing a Right of Way along a Watercourse into a Navigable River.

That the plaintiff was possessed of certain land, and was entitled to have a right of way from the said land to and along a stream or watercourse into a certain public navigable river, and so back again from the said river to and along the said stream or watercourse and thence to the said land of the plaintiff, for himself and his servants to go, return, pass and repass in boats at all times of the year, at his and their free will and pleasure; and the defendant wrongfully obstructed the said way.

A like count: Bower v. *Hill*, 1 Bing. N. C. 549.

Counts for nuisances and obstructions to public highways, see ante, "Nuisance," p. 324.

Witness.

Count against a Witness for not attending in pursuance to a Subpœna (*a*).

That the plaintiff commenced an action against *G. H.* in the Court

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1 Q. B. 792.) If the declaration alleges the right too largely, and the plaintiff can only prove a part, he is not entitled to the verdict on a traverse of the right (*Brunton* v. *Hall*, 1 Q. B. 792); but if the allegation is divisible, he may have a verdict for such divisible part as he succeeds in proving, see *Giles* v. *Groves*, 12 Q. B. 721; and see "*Commons*," *ante*, p. 249. In pleading a *private* right of way it is necessary to state the *termini*, but not in the case of a public way. (*Rouse* v. *Bardin*, 1 H. Bl. 353.)

(*a*) This action is at common law, and is the usual mode of suing; but the plaintiff may proceed under the statute 5 Eliz. c. 9, s. 12, which gives to the party grieved an action of debt for a penalty of £10, and such further recompense as by the direction of the judge of the court out of which the said process shall be awarded, according to the loss and hindrance that the

of —— at Westminster, and such proceedings were thereupon had in the said action that certain issues joined therein were about to come on for trial by a jury of the country, and the plaintiff sued out of the said court a writ of subpœna ad testificandum directed to the defendant; whereby her Majesty the Queen commanded the defendant that all things set aside and ceasing every excuse, he should be and appear in his proper person before [her justices assigned to take the assizes in and for the county of ——, at ——, in the said county, *or as the case may be according to the subpœna*], on ——, the —— day of —— instant, by —— of the clock in the forenoon of the same day, to testify the truth according to his knowledge in the said action then depending between the plaintiff and the said *G. H.*, on the part of the plaintiff, and at the day aforesaid to be tried, and that the defendant should by no means omit under the penalty of £100; and the plaintiff, a reasonable time before the time appointed for the trial of the said issues, caused the said writ to be made known and shown to the defendant, and a copy thereof to be left with him, and then paid him a reasonable sum of money for his costs and charges in and about his attendance as a witness according to the said writ, and the said issues in the said action afterwards in the place in the said subpœna mentioned were called on for trial, and the appearance and testimony of the defendant were neces-

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party which procured the said process shall sustain by reason of the non-appearance of the witness. See a count framed on this statute: *Pearson* v. *Iles*, 2 Doug. 556. The witness may also be proceeded against by attachment for contempt of court. (1 Chit. Pr. 11th ed. 348.)

Where the declaration alleged that the plaintiff had a good cause of action in the original suit, and that the evidence of the defendant was material, it was held that these allegations were not denied by the plea of not guilty (*Needham* v. *Fraser*, 1 C. B. 815); but a good cause of action in the original suit is not essential in all cases to maintain an action against a witness for not attending, for where several issues were joined in the original suit, on some of which the plaintiff was entitled to succeed, although he had no cause of action, he may maintain an action against the witness in respect of the issues lost through his absence. (*Couling* v. *Coxe*, 6 C. B. 703.)

The existence of actual damage is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpœna. (*Couling* v. *Coxe*, 6 C. B. 703; and see *Yeatman* v. *Dempsey*, 7 C.B. N. S. 628; 29 L. J. C. P. 177.) The plaintiff is entitled to recover all the costs he has been put to by the non-attendance of the defendant as a witness, if laid as damages in the declaration; as where he has been compelled to withdraw the record he may recover his own costs of going to trial, and the costs he has become liable to pay to the opposite party. (*Needham* v. *Fraser*, 1 C. B. 815, 823.) And as above stated, where there are several issues, he may recover the costs of those which would have been found for him upon the testimony of the defendant, though he failed upon other issues which defeated the action. (*Couling* v. *Coxe*, *supra*.)

Conduct money paid to a witness with a subpœna, if the witness does not attend, may be recovered back as money received to the use of the plaintiff. (*Martin* v. *Andrews*, 7 E. & B. 1; 26 L. J. Q. B. 39.)

An action for defamation will not lie against a witness for false and malicious statements made in the course of judicial proceedings (*Lake* v. *King*, 1 Wms. Saund. 31 *b* (1); *Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Bromhead*, 4 H. & N. 569; 28 L. J. Ex. 360; and see *ante*, p. 263); but a *qui tam* action is given to the party grieved, against a person committing wilful perjury to recover the penalty of twenty pounds, by 5 Eliz. c. 9, ss. 6, 8.

sary and material on behalf of the plaintiff on the trial of the said issues, and the plaintiff could not safely proceed to trial without the appearance and testimony of the defendant; yet the defendant did not appear as a witness according to the said writ of subpœna, whereby the plaintiff was obliged to withdraw the record of the said issues, and to pay to the said *G. H.* his costs, and lost the expenses which he had incurred in preparing for the trial of the said issues, and incidental thereto, and was delayed in his said action.

Like counts: Mullett v. *Hunt*, 1 C. & M. 752; *Lamont* v. *Crook*, 6 M. & W. 615; *Needham* v. *Fraser*, 1 C. B. 815; 3 D. & L. 190; *Couling* v. *Coxe*, 6 C. B. 703.

Like counts where the plaintiff was nonsuited in consequence of the defendant not attending on his subpœna: Masterman v. *Judson*, 8 Bing. 224; *Davis* v. *Lovell*, 4 M. & W. 678.

Count for not producing documents in obedience to a subpœna duces tecum: Amey v. *Long*, 9 East, 473.

Count (in contract) for breach of a promise to attend and give evidence without a subpœna: ante, p. 234.

Count for preventing the service of a subpœna on a witness: Wigens v. *Cook*, 6 C. B. N. S. 784, 787.

CHAPTER IV.

COMMENCEMENTS AND CONCLUSIONS OF PLEAS AND SUBSEQUENT PLEADINGS.

Commencement of a Plea in Bar. (*C. L. P. Act*, 1852, *s.* 67; *Sched. B.* 34) (*a*)

In the Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas].

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person, *as the case may be*] says [*here state the substance of the plea: no formal conclusion is necessary.* C. L. P. Act, 1852, s. 67.]

(*a*) *Form of commencement.*]—By the C. L. P. Act, 1852, s. 67, "No formal defence shall be required in a plea, or avowry, or cognizance, and it shall commence as follows, or to the like effect:—

"The defendant by —— his attorney" [*or* in person, *or as the case may be*] "says that" [*here state the first defence*].

And it shall not be necessary to state in a second or other plea, or avowry, or cognizance, that it is pleaded by leave of the court or a judge, or according to the form of the statute, or to that effect; but every such plea, avowry, or cognizance, shall be written in a separate paragraph, and numbered, and shall commence as follows, or to the like effect:—

"And for a second [*etc.*] plea the defendant says that" [*here state second, etc., defence*].

Or if pleaded to part only, then as follows, or to the like effect:—

"And for a second [*etc.*] plea to" [*stating to what it is pleaded*], "the defendant says that," [*etc.*]

And no formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading."

Title and date.]—"Every pleading shall be entitled of the proper court, and of the day of the month and the year when the same was pleaded, and shall bear no other time or date." (C. L. P. Act, 1852, s. 54; and see *ante*, p. 1, n. (*b*).)

Time for pleading.]—The defendant having appeared may plead at once after the delivery or filing of the declaration; but he is not obliged to plead in bar without a notice to do so. For the plaintiff cannot sign judgment for want of a plea unless notice to plead has been given. (*Fenton* v. *Anstice*, 5 Dowl. 113; 1 Chit. Pr. 11th ed. 230.) Formerly a rule to plead and a demand of plea were also necessary; but by the C. L. P. Act, 1852, s. 62, "No rule to plead or demand of plea shall be necessary, and the notice to plead indorsed on the declaration or delivered separately shall be sufficient."

By s. 63, "In cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, shall be eight days; and a notice requiring the defendant to plead thereto in eight days, otherwise judgment may, whether the declaration be delivered or filed, be indorsed upon the declaration or delivered separately;" and see s. 29.

The proceedings in actions against defendants out of the jurisdiction are regulated by ss. 18, 19. (See *Bates* v. *Bates*, 30 L. J. C. P. 191; and see 1 Chit. Pr. 11th ed. 211.)

The time for pleading dates from the notice to plead, and is reckoned exclusive of the first day and inclusive of the last day (r. 174, H. T. 1853).

Dilatory pleas, as pleas to the jurisdiction and pleas in abatement, must be pleaded within four days. (1 Chit. Pl. 7th ed. 460, 471.) If the last day in any case is a Sunday, Christmas-day, Good Friday, or public fast or thanksgiving, the time is to be reckoned exclusive of that day. And the days between Thursday next before and Wednesday next after Easter-day, and Christmas-day and the three following days, are not to be reckoned (rr. 174, 175, H. T. 1853).

The notice to plead should mention the time allowed for pleading. (*Hifferman* v. *Langelle*, 2 B. & P. 363.) And if it mentions a longer time than necessary the defendant is entitled to the whole of it. (*Solomonson* v. *Parker*, 2 Dowl. 405.) If it mentions no time, or too short a time, it is irregular; see Chit. Forms, 9th ed. 99.

By r. 21, H. T. 1853, "A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order." If the defendant requires further time to plead, he must apply for a judge's order (1 Chit. Pr. 11th ed. 244), which, if granted, is generally made subject to what are called "the usual terms;" these are "pleading issuably, rejoining gratis, and taking short notice of trial." (*Ib.* p. 246.) As to what is an issuable plea, see *post*, p. 378. Rejoining gratis means rejoining within four days after replication, without a notice to rejoin. If the defendant does not plead within the time or extended time allowed, the plaintiff may sign judgment; see "*Judgment for want of a Plea*," 1 Chit. Pr. 11th ed. 288.

By the C. L. P. Act, 1852, s. 90, "Where an amendment of any pleading is allowed, no new notice to plead thereto shall be necessary; but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after the amendment, whichever shall last expire, unless otherwise ordered by the court or a judge; and in case the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the court or a judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading."

No plea (except a defence pleaded *puis darrein continuance*, C. L. P. Act, 1852, s. 69) can be delivered between the 10th August and 24th October (2 Will. IV. c. 39, s. 11), and a plea delivered within that time is a nullity. By r. 9, H. T. 1853, "In case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, etc., shall have the same number of days for that purpose after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October."

Substance or body of the plea.]—The plea is a statement by the defendant of his answer to the plaintiff's declaration.

Pleas are commonly divided into pleas *dilatory* and pleas *peremptory* or *in bar*: the former are not pleaded to the cause of action, but are pleaded either to the *jurisdiction* of the court in which the action is brought, or in *abatement* of the action in its present form; the latter are pleaded to the *cause of action* alleged in the declaration. (Steph. Pl. 6th ed. 43; 1 Chit. Pl. 7th ed. 457.)

As to pleas to the jurisdiction, see *post*, "*Jurisdiction*," c. 5; and as to pleas in abatement, see *post*, "*Abatement*," c. 5.

Pleas in bar answer the alleged cause of action; they either deny facts stated in the declaration which are material to the cause of action, or, admitting the facts alleged in the declaration, they state some new matter of fact which avoids their legal effect. The former are called *traverses* or *pleas in denial;* the latter, *pleas in confession and avoidance.*

Pleas in denial or traverses.]—Pleas in denial either traverse specifically and in terms some material allegation in the declaration, and may be called specific traverses, or they deny in a general and appropriate form one or more of the facts, and are called general traverses or general issues. As to the scope of the general issue, and when it is necessary or proper to use a specific traverse, see *post*, c. 5, "*General Issue*," and c. 6, "*General Issue*."

Formerly, any defences which amounted to the general issue must have been pleaded in that form; but by the C. L. P. Act, 1852, s. 76, "A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse."

A specific traverse should be framed in the terms of the allegation denied, and it will be in a negative or affirmative form, according to the form of the allegation traversed. It should deny only the substance of the allegation, and must not include any immaterial things involved in it, as time, quantity, or amount. If the denial covers several things, any of which would be sufficient to maintain the action, care must be taken to frame the traverse in the disjunctive. Traverses formerly denied the facts "in manner and form as alleged;" but these words were not essential, and the words "in manner and form" are now omitted. (Steph. Pl. 6th ed. 143.)

There is one allegation, which now frequently occurs in declarations, which cannot be traversed in terms. This is the general averment of the performance of conditions precedent which is allowed by the C. L. P. Act, 1852, s. 57. That section expressly provides that "the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest." See "*Conditions Precedent*," *ante*, p. 124 (*a*), and *post*, p. 483 (*a*).

The denial of the breach in counts in contract is sometimes framed, like other specific traverses, in the terms of the allegation traversed, and sometimes in the form of a general denial; thus, "the defendant denies the alleged breach." The practice at judges' chambers differs as to the form in which the plea is allowed to be pleaded; some of the learned judges require a specific traverse in terms, whilst others allow the general denial (and see *Coulson* v. *Attwood*, 26 L. J. Ex. 244, 245, n. (1)). Until an uniformity of practice is finally established, the safer course would seem to be to traverse the breach in terms.

A plea in denial admits the truth of all the allegations in the declaration which are not denied by it, provided they are material and might be denied; for it is an essential principle of pleading that whatever is not denied is admitted, and each plea is to be considered by itself, as if it were the only one on the record. Thus, a plea of the general issue admits the truth of all the material allegations which it does not cover; and a specific traverse admits the truth of all the other material allegations contained in the declaration. (*Jones* v. *Brown*, 1 Bing. N. C. 484; *Noel* v. *Boyd*, 4 Dowl. 415; *Sanderson* v. *Collman*, 4 M. & G. 209, 225; and see, as to the effect of the general issue, *post*, cc. 5, 6.)

Matters of inducement which are explanatory only of the facts and not essential to the cause of action cannot be traversed. (Steph. Pl. 6th ed. 208.)

Allegations of special damage cannot be traversed or pleaded to, except where the special damage constitutes the gist of the action, when it is denied by the plea of the general issue (see *ante*, p. 9).

Inferences of law cannot be traversed or disputed by plea; thus, allega-

tions of duty which are the legal result of facts cannot be traversed. (*Trower* v. *Chadwick*, 3 Bing. N. C. 334; *Cane* v. *Chapman*, 5 A. & E. 647; *Seymour* v. *Maddox*, 16 Q. B. 326; and see *Dutton* v. *Powles*, 30 L. J. Q. B. 169.) The proper mode of meeting such allegations is either to traverse the facts which raise the duty in law, or to dispute the legal inference drawn from the facts by demurrer.

Pleas in confession and avoidance.]—Pleas in confession and avoidance confess the truth of the facts alleged in the declaration to which they are pleaded, and state new facts which avoid their legal effect. They have been naturally divided into two classes (Steph. Pl. 6th ed. 173): *Pleas in justification or excuse*, stating facts which show that the plaintiff never had any cause of action; as, to a declaration charging that the defendant assaulted the plaintiff, the plea that the plaintiff first assaulted the defendant, whereupon the defendant committed the alleged assault in self-defence; or, to a declaration upon a contract, the plea that the plaintiff and defendant rescinded or altered it before breach; and *pleas in discharge*, stating facts which show a subsequent discharge of a cause of action once subsisting; as, to a declaration for a breach of contract, the plea that the plaintiff afterwards by deed released the defendant; or, to a declaration for a debt, the plea that the defendant discharged it by payment. The distinction depends upon whether the defence existed before the alleged breach or arose after it.

If the new matter constituting the defence by way of satisfaction or discharge arose before action, it is pleaded in bar generally; if it arose afterwards and before plea, it is pleaded in bar to the further maintenance of the action; if it arose after plea, it may be pleaded *puis darrein continuance*. (See *post*, p. 387.)

Replications and subsequent pleadings may also be either traverses or in confession and avoidance of the preceding pleading; but the latter do not admit of the above classification into matters in justification or excuse and matters in discharge.

By r. 8, T. T. 1853, "In every species of actions on contract all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *e. g.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, etc., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded." By r. 12, T. T. 1853, the same rule is applied to actions on covenants and specialties; and by r. 17, T. T. 1853, in actions for wrongs independent of contract, all matters in confession and avoidance shall be pleaded specially, as in actions on contract.

Matters founded on the rules and practice of the courts, or being mere irregularities in procedure, are not in general pleadable. (1 Chit. Pl. 7th ed. 486.)

Matter of defence upon equitable grounds could not be pleaded at common law, but may now be pleaded under the C. L. P. Act, 1854, s. 83. (See *post*, c. 5, "*Equitable Pleas.*")

Provisions of the C. L. P. Act, 1852, as to pleas, etc.]—The following provisions of the C. L. P. Act, 1852, in addition to those already noticed, and to some others which will be found under the forms to which they more particularly relate, have simplified the mode of framing pleas, and have also dispensed with many formal requirements, such as express colour, special traverses, etc., which were formerly necessary or material in certain cases.

By s. 49, "All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial," "and all statements of a like kind shall be omitted."

By s. 51, "No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer."

By s. 52, "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit."

By s. 55, "It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made, it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document."

By s. 56, "A party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out." (See *Sim* v. *Edmands*, 15 C. B. 240.)

By s. 57, "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest." (See *ante*, p. 124, and *post*, p. 483.)

By s. 64, "Express colour shall no longer be necessary in any pleading," and the use of it seems to be prohibited by sect. 49, *supra*.

By s. 65, "Special traverses shall not be necessary in any pleading."

Pleas construed distributively.]—By the C. L. P. Act, 1862, s. 75, "Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of actions proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered."

Under this section the defendant becomes entitled to the costs of the issue for so much as he proves, and the plaintiff is entitled to the costs for the residue; but the latter are immaterial, unless the residue has been disputed. (See *Traherne* v. *Gardner*, 8 E. & B. 161; 26 L. J. Q. B. 259.) Before the above enactment, the defendant was bound to prove payment or set-off of the debt proved against him to the full amount of his plea; otherwise he lost the verdict upon it (unless the excess of the debt was covered by other pleas on which he succeeded), and the payment or set-off proved went only in reduction of damages. (*Cousins* v. *Paddon*, 2 C. M. & R. 547; *Moore* v. *Butlin*, 7 A. & E. 595; *Tuck* v. *Tuck*, 5 M. & W. 109; *Kilner* v. *Bailey*, 5 M. & W. 382.)

Under the above section it has been held upon demurrer, in an action for not delivering goods, to which the defendant pleaded by way of accord and satisfaction an agreement that he should deliver other goods instead, and that he delivered part of them and tendered the residue, that the whole plea was bad, and that it could not be taken distributively as an answer to part of the declaration. (*Gabriel* v. *Dresser*, 17 C. B. 622; 24 L. J. C. P. 81.) See also *Wilkinson* v. *Kirby*, 15 C. B. 430; 24 L. J. C. P. 81, where the above section was again referred to on the argument of a demurrer; and the court suggested that it applied only to pleas in confession and avoidance and not to pleas by way of denial, and that it did not affect the established principle of pleading that a plea which is bad in part is bad altogether; that the meaning of the section is that when, at the trial, the facts can be taken distributively, they are to be so taken.

Independently of this enactment, in actions where the declaration is general and relates to various debts or causes of action, and a general traverse

Commencement of a Second Plea in Bar (C. L. P. Act, 1852, s. 67, Sched. B. 35) (a).

2. And for a second plea the defendant says [*here state the substance of the plea*].

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is pleaded, the issue is distributable, as where the general issue is pleaded to an indebitatus count, the verdict may be entered for the plaintiff for a part of the debt claimed, and for the defendant for the residue. (*Cousins* v. *Paddon*, 2 C. M. & R. 547; *Traherne* v. *Gardner*, 26 L. J. Q. B. 259; 8 E. & B. 161.) In actions of trover the pleas of the general issue and not possessed are divisible, and the verdict may be entered for the plaintiff as to some of the goods, and for the defendant as to the others. (*Williams* v. *Great Western Ry. Co.* 1 Dowl. N. S. 16; *Freshney* v. *Wells*, 26 L. J. Ex. 228.) In trespass, the issue under a traverse of the property may be found for the plaintiff as to certain closes, and for the defendant as to others. (*Phythian* v. *White*, 1 M. & W. 216.) In actions for the disturbance of an easement where the right is stated too largely and is traversed, the verdict may be found for the plaintiff as to part. (*Giles* v. *Groves*, 12 Q. B. 721.) Where an issue is found partly for the plaintiff and partly for the defendant, the costs of the issue follow the finding. (*Reynolds* v. *Harris*, 28 L. J. C. P. 26.)

Issuable pleas.]—An issuable plea is one which puts the merits of the cause in issue, either on the facts or the law, and upon which a decision on demurrer or by a jury would determine the action upon the merits (*Mackay* v. *Wood*, 7 M. & W. 420, 721; *Zulueta* v. *Miller*, 2 C. B. 895, 904); it does not mean necessarily a good plea (*Steele* v. *Harmer*, 14 M. & W. 136, 139); but a plea which has been already adjudged to be bad by the judgment of a court is a non-issuable plea, and a party is not entitled to question such a decision after an undertaking to plead issuably (*Beauclerk* v. *Hook*, 20 L. J. Q. B. 485); so also a plea which is manifestly bad and frivolous (*Brown* v. *Austin*, 4 Dowl. 161; *Humphreys* v. *Earl Waldegrave*, 6 M. & W. 622; *Millett* v. *Brown*, 2 H. & N. 837); a plea in abatement is not an issuable plea, as a plea that the plaintiff is an alien enemy (*Shepeler* v. *Durant*, 14 C. B. 582); nor is a plea of the bankruptcy of one of several joint plaintiffs (*Staples* v. *Holdsworth*, 4 Bing. N. C. 144); but a plea of the bankruptcy of the defendant is an issuable plea. (*Serle* v. *Bradshaw*, 2 C. & M. 148.) A general demurrer is an issuable pleading (although a special demurrer was not so); and therefore a defendant does not now preclude himself from demurring by being put under terms to plead issuably. If the defendant, being under terms to plead issuably, pleads a non-issuable plea, either alone or with others, the plaintiff may treat the plea or the whole of the pleas, if several, as a nullity, and sign judgment for want of a plea; but he waives the objection if he takes any subsequent step which recognizes the pleas, as obtaining time to reply (*Stead* v. *Carey*, 7 M. & G. 646); obtaining particulars of set-off (*Scott* v. *Watson*, 1 C. B. 827; *Verbist* v. *De Keyser*, 3 D. & L. 392); but the judgment cannot be signed before the time for pleading has expired. (*Macher* v. *Billing*, 1 C. M. & R. 577; *Dakins* v. *Wagner*, 3 Dowl. 535.) A defendant who is under terms to plead issuably is not justified in pleading a non-issuable plea by a judge's order to plead several matters (*Humphreys* v. *Earl Waldegrave*, 6 M. & W. 622), nor can it be supported by an affidavit of the defendant that it was pleaded *bonâ fide*. (*Bateson* v. *Lee*, 1 D. & L. 224.)

See further as to issuable pleas, 1 Chit. Pr. 11th ed. 246.

(*a*) *Pleading several matters.*]—By the common law the defendant was not allowed to plead more than one plea to the same part of the declaration, although he might plead several pleas when each answered a different part. So the plaintiff was confined to a single replication. (Steph. Pl. 6th ed. 302.) This strictness was first relaxed in favour of the defendant by 4 & 5 Anne, c. 16, s. 4, which enabled him with leave of the court to plead to the declara-

tion as many several matters as he should think necessary. The same right has now been extended to the plaintiff in his replication, and to both parties in the subsequent pleadings, by the following enactments of the C. L. P. Act, 1852, and the rules of H. T. 1853.

By the C. L. P. Act, 1852, s. 81, "The plaintiff in any action may by leave of the court or a judge plead, in answer to the plea or the subsequent pleading of the defendant, as many several matters as he shall think necessary to sustain his action; and the defendant in any action may, by leave of the court or a judge, plead in answer to the declaration or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application or his attorney, if required by the court or a judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance, are respectively true in substance and in fact; provided that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."

By s. 83, "All objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries, or cognizances, on the ground that they are founded on the same ground of answer or defence (see r. 2, T. T. 1853, *infra*), shall be heard upon the summons to plead several matters."

By s. 84, "The following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge; that is to say,—

A plea denying any contract or debt alleged in the declaration.
A plea of tender as to part.
A plea of the Statute of Limitations.
Set-off.
Bankruptcy of the defendant.
Discharge under an Insolvent Act.
Plenè administravit.
Plenè administravit præter.
Infancy.
Coverture.
Payment.
Accord and satisfaction.
Release.
Not guilty.
A denial that the property, an injury to which is complained of, is the plaintiff's.
Leave and licence.
Son assault demesne.

And any other pleas which the judges of the superior courts, or any eight or more of them, of whom the chief judges of the said courts shall be three, shall, by any rule or order to be from time to time by them made in term or vacation, order or direct."

No other pleas have been added to the above list.

By s. 86, "Except in the cases herein specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party shall be at liberty to sign judgment; provided that such judgment may be set aside by the court or a judge, upon an affidavit of merits, and such terms as to costs and otherwise as they or he may think fit." (See *Harvey* v. *Hamilton*, 4 Ex. 43.)

It is further provided by r. 2, T. T. 1853, that "Several pleas, replications, or subsequent pleadings, or several avowries or cognizances, founded on the

same ground of answer or defence, shall not be allowed; provided, that on an objection taken before the judge on a summons to plead several matters on the ground of such pleadings being in violation of this rule, the court or the judge may allow such pleadings founded on the same ground of answer or defence as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the court or judge may think fit." By r. 3, "When no such rule has been made as to costs, and on the trial there is more than one pleading founded on the same ground of answer or defence, and the judge shall, at the trial, certify to that effect on the record, the party so pleading shall be liable for all costs occasioned by such pleading, in respect of which he has failed to establish a distinct ground of answer or defence, including those of the evidence as well as those of the pleading."

The words used in the repealed r. 5, H. T. 4 Will. IV. were "one and the same principal matter," for which the above expression, "same ground of answer or defence," has been substituted; in the same way as with reference to declarations in r. 1, the words "the same cause of action" are substituted for "subject-matter of complaint;" so that where a single state of facts produces several legal results, the latter may be made the ground of several counts, pleas, etc., without a violation of the rules; and the court or a judge has a discretion to allow even a violation of the rules when it appears necessary for determining the real question in controversy on its merits. Where there is a reasonable doubt whether the pleas are founded on the same ground, they will be allowed together; lest otherwise the defendant should be deprived of his defence. (*Shropshire Union Ry. Co.* v. *Anderson*, 3 Ex. 401, 405.)

The following are instances of pleas which the courts have refused to allow to be pleaded together:—

Pleas of the general issue, with special pleas of matter which might be proved under the general issue. (*Norton* v. *Scholefield*, 1 Dowl. N. S. 638; *Matthews* v. *Matthews*, 7 C. B. 1024.) And in actions on the indebitatus counts the plea of *nunquam indebitatus*, with a plea setting up the pendency of a special contract. (*Gardner* v. *Alexander*, 3 Dowl. 146.) In an action by a railway company for calls, *nunquam indebitatus*, with pleas that the defendant was not a proprietor, and that notice of the calls was not given; the company being bound to prove these facts under the general issue. (*London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 138.) To an action on a policy *non assumpsit* and a special plea setting up the terms of a memorandum annexed to the policy. (*Heath* v. *Durant*, 12 M. & W. 438.) A plea of the general issue "by statute," together with a special plea amounting to the general issue at common law. (*Ross* v. *Clifton*, 11 A. & E. 631; *Legge* v. *Boyd*, 1 M. & G. 898; *Langford* v. *Woods*, 7 M. & G. 628.) In an action for malicious prosecution, not guilty and a special plea of want of probable cause. (*Cotton* v. *Browne*, 3 A. & E. 312.) In an action for polluting plaintiff's well, not guilty, and a plea denying that the water was polluted. (*Norton* v. *Scholefield*, 9 M. & W. 665.) In an action of libel, a plea of the general issue, with a special plea of circumstances showing that it was privileged. (*Lucan* v. *Smith*, 26 L. J. Ex. 94; 1 H. & N. 481.)

Also, whenever the pleas are substantially founded on the same ground, though varied in statement; thus, four pleas, all amounting to an allegation of the same fraud, only stating it with various circumstances, were disallowed. (*Reid* v. *Rew*, 2 Dowl. N. S. 543.)

Also, whenever the statement in one plea is included in the wider statement of another, they are considered as founded on the same ground. (*Thomson* v. *Bradbury*, 1 Bing. N. C. 326.) As in an action on a bill, a plea that the bill was not duly stamped, and a plea traversing the acceptance. (*Dawson* v. *Macdonald*, 2 M. & W. 26.) So in an action for infringement

of a patent, pleas to the whole patent, with pleas of the same matter to the undisclaimed part of the patent (*Clark* v. *Kenrick*, 1 D. & L. 392); or a plea that the patent was not a new manufacture, with a plea that it was not an invention in respect of which a patent could be granted (*Walton* v. *Bateman*, 3 M. & G. 773); or a plea that the plaintiff was not the first inventor, with pleas that other persons were the first inventors: but a plea that the invention was not new was allowed, together with a plea that part of the invention was not new, because the invention collectively might be new, though parts of it were not. (*Bentley* v. *Keighley*, 6 M. & G. 1039.) In trover by the assignees of a bankrupt, the plea of not possessed, and a plea that the goods were taken in execution without notice of a prior act of bankruptcy, were not allowed together (*Turquand* v. *Hawtrey*, 9 M. & W. 727), because the latter was contained in the former. In actions of trespass, pleas that the close is not the plaintiff's, and *liberum tenementum*, and a justification under a *jus tertii*, are allowed together (*Morse* v. *Apperley*, 6 M. & W. 145; *Slocombe* v. *Lyall*, 6 Ex. 119); notwithstanding the objection that under the former the defendant might prove both the latter. (*Jones* v. *Chapman*, 2 Ex. 803.)

The court or a judge, in the exercise of their discretion, would not formerly allow any pleas to be pleaded together which were grossly repugnant and inconsistent; but at present this objection is substantially limited to not allowing any other pleas to be pleaded to the same parts of the declaration with tender (*Maclellan* v. *Howard*, 4 T. R. 194; *Orgill* v. *Kemshead*, 4 Taunt. 459), or payment into court (*Thompson* v. *Jackson*, 1 M. & G. 242; *Hart* v. *Denny*, 1 H. & N. 609; *Gales* v. *Holland*, 7 E. & B. 336; *O'Brien* v. *Clement*, 15 M. & W. 435); and to not allowing together such pleas as would produce an incongruity on the record. (See 1 Chit. Pr. 11th ed. p. 277.)

In an action against an executor, the defendant has been allowed to plead *ne unques executor* and *plene administravit*. (*Tyson* v. *Kendall*, 19 L. J. Q. B. 434.) A defendant, sued as a member of a company, may plead that he was not a member of the company, with a plea of payment. (*Phillipson* v. *Tempest*, 1 D. & L. 209.)

In replevin, a defendant was allowed to plead two avowries, justifying under different and inconsistent titles. (*Evans* v. *Davies*, 8 A. & E. 362.)

Formerly pleas in bar and pleas in bar to the further maintenance of the action were not allowed to be pleaded together; but now by r. 22, T. T. 1853, "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action; provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea." But this, by r. 23, does not apply to the case of such plea pleaded by one or more only out of several defendants.

Leave will be refused to plead manifestly bad or immaterial pleas (*London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 143; *Murray* v. *Boucher*, 9 Dowl. 537); as a plea of the defendant's bankruptcy in an action against him as the public officer of a company (*Steward* v. *Dunn*, 11 M. & W. 63); but not if there be any reasonable doubt on the subject. (*Bulley* v. *Foulkes*, 7 Dowl. 839; *Bailey* v. *Cathrey*, 1 Dowl. N. S. 456.) Leave will also be refused to plead pleas which, though not bad or immaterial on the face of them, are in fact beside the merits, and only pleaded to embarrass the opponent. (*Gully* v. *Bp. Exeter*, 4 Bing. 525; 5 Bing. 42; and see *London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 137; *Cooling* v. *Gt. Northern Ry. Co.* 15 Q. B. 486; *South-Eastern Ry. Co.* v. *Hebblewhite*, 12 A. & E. 497.)

A plaintiff has been allowed to plead a special replication, together with a general denial of the plea, although it does not raise a distinct

defence, where the special replication enables the defendant to raise the question in dispute by demurrer. (*Williams* v. *African Steam Co.* 1 H. & N. 19.)

A new assignment and a replication to the same plea may be pleaded together without leave.

See further as to pleading several pleas, 1 Chit. Pr. 11th ed. p. 275.

A traverse casts upon the plaintiff the burden of proving the allegation denied: but it is not always advisable to traverse every traversable allegation, because the defendant has to pay the costs of the issues on which he fails (C. L. P. Act, 1852, s. 81, *ante*, p. 378); and also because where the proof of any issue lies upon the plaintiff he has the right to begin, which involves the right of reply if evidence is adduced by the defendant. This may still be an important consideration notwithstanding the C. L. P. Act, 1854, s. 18.

In all actions for unliquidated damages, whether in contract or in tort, the plaintiff has the right to begin by reason of the proof of the damages lying upon him, though all the other issues lie upon the defendant; but in actions for ascertained or nominal damages, the defendant, by omitting to traverse and pleading affirmatively only, may gain the right to begin. (*Mercer* v. *Whall*, 5 Q. B. 447; and see, as to the Practice at Nisi Prius, Roscoe on Evidence, 10th ed. 218; Taylor on Evidence, 3rd ed. 344–352.)

On the other hand, it is sometimes important to take a traverse in order to compel the plaintiff to call a particular witness whom the defendant may wish to cross-examine, or to prove a particular fact which may be essential to his case; and this may sometimes enable the defendant to dispense with calling witnesses.

Order of pleas in bar.]—There is no rule or uniform practice as to the order of placing several pleas in bar on the record; but there is a natural order, which in well-drawn pleadings is generally observed, subject to such modifications as the circumstances of each particular case may render expedient. Thus, traverses are placed before pleas in confession and avoidance; the general issue being pleaded first, and then specific traverses in the order of the allegations denied. Of pleas in confession and avoidance those in justification or excuse are placed before those in satisfaction or discharge: but the most common pleas, as the Statute of Limitations, leave and licence, payment, accord and satisfaction, or release, are frequently pleaded before more special ones. Set-off, which is in the nature of a cross-action, is placed after the more direct answers to the plaintiff's claim. Payment into court is generally pleaded last, as an issue is seldom raised upon it (at least, when it is pleaded to an indebitatus count). Where there are several counts, if the same general issue is applicable to more than one of them, it is usually pleaded first to all those to which it will apply; and after that, the traverses and pleas in confession and avoidance to the particular counts in their order. But if there is any other plea applicable to the whole or to several counts of the declaration, as payment, release, etc., it should be pleaded once for all (either before or after the more limited pleas according to its character); and the same plea should not be unnecessarily repeated to different parts of the declaration. Equitable pleas are generally placed after legal defences; and when a defendant pleads and demurs, either to the same or to different parts of the record, all the pleas are most frequently placed first.

Abstract of pleas.]—In order to obtain leave to plead several matters, an abstract of the proposed pleas has to be served with the summons and laid before the judge. This is usually drawn by counsel or pleader on settling the pleas. Care must be taken that it represents the substance of the pleas correctly, as otherwise they would be pleaded without leave, and the plaintiff might sign judgment. (*Hills* v. *Hayman*, 2 Ex. 323;

Plea to one of several Counts (a).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], as to the first [*or* second, *or as the case may be*] count of the declaration, says [*here state the substance of the plea, limiting it to the count pleaded to*].

2. And for a second plea the defendant (*b*), as to the first [*or* second *or as the case may be*] count of the declaration, says [*here state the substance of the plea, limiting it to the count pleaded to*].

Plea to a part of an Indebitatus Count (specifying the Amount pleaded to) and Plea to the Residue (a).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], as to £——, parcel of the money claimed, says [*here state the substance of the plea, limiting it to the part, which may be*

Flight v. *Smale*, 4 C. B. 766; *Holliday* v. *Bohn*, 3 Sc. N. R. 496; *Wills* v. *Robinson*, 5 Ex. 302; *Cork and Bandon Ry. Co.* v. *Coode*, 13 C. B. 618; *Gabardi* v. *Harmer*, 3 Ex. 239.) The defendant is not bound to plead all the pleas allowed; and he may limit to part of the declaration a plea which he has obtained leave to plead to the whole. (*Fryer* v. *Andrews*, 1 Ex. 471; see 1 Chit. Pr. 11th ed. 287.)

Pleading and demurring together.]—See C. L. P. Act, 1852, s. 80; and see *post*, c. 7, "*Demurrer.*"

Amendment of pleas.]—As to amendment of pleas and as to adding and withdrawing pleas, see 1 Chit. Pr. 11th ed. 296; and see *post*, c. 6, "*Relinquishment of plea.*"

(*a*) The defendant must answer the whole declaration, either by one plea to the whole, or by several pleas to several parts of the declaration where it is divisible. If any count of the declaration, or any part of any count of the declaration, forming a distinct cause of action, is left unanswered, the plaintiff may sign judgment for want of a plea, as to that count or part of a count. (1 Wms. Saund. 28 *a* (3); 1 Chit. Pr. 11th ed. 291.) A plea to one of several counts or to part of a count must be expressly limited in the commencement to the count or part to which it is pleaded; and if not so limited, it is taken to be pleaded to the whole declaration.

Every plea must in substance answer the whole matter to which it is pleaded; and if it does not give a sufficient answer to the whole, it is bad in substance, and the plaintiff may demur, but he cannot in that case sign judgment for the matter insufficiently answered. (1 Wms. Saund. 28 *a* (3); *Thomas* v. *Heathorn*, 2 B. & C. 477; *Eddison* v. *Pigram*, 16 M. & W. 137.)

(*b*) By the C. L. P. Act, 1852, s. 67 (cited *ante*, p. 373), every plea shall be written in a separate paragraph, and numbered. Where there are several pleas it is usual in practice both to state the number in the body of the plea, and also to number the pleas with figures in the margin as above. It should be remembered that the number of the plea only marks its place in the numerical succession of the pleas, without any reference to the matter to which it is pleaded. Hence it is ambiguous to say, as is sometimes done, "for a second, third, etc., plea to the first, second, etc., count," for the plea may be the first plea to the count to which it is pleaded, whilst it is the second, third, or fourth, etc., plea in the order of succession. This ambiguity is avoided by the form used above, which interposes the words "the defendant" between the number of the plea and the statement of what it is pleaded to.

referred to throughout the body of the plea as the claim of the plaintiff herein pleaded to].

2. And for a second plea the defendant, as to the residue of the money claimed, says [*here state the substance of the plea, limiting it to the part as above. If it is required to plead separately to other parts of the claim, plead the second or other plea* as to £——, other parcel of the money claimed, *and plead a third or other plea* as to the residue of the money claimed].

Plea to a Part of an Indebitatus Count (excepting the Amount not pleaded to), and Plea to the Part excepted.

In the ——.

The —— day of ——, A.D.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], except as to £——, parcel of the money claimed, says [*here state the substance of the plea, limiting it to the part, which may be referred to as* the claim of the plaintiff herein pleaded to].

2. And for a second plea the defendant, as to the said £——, parcel of the money claimed, says [*here state the substance of the plea, limiting it to the part as above*].

Plea to part of a claim under an indebitatus count which accrued due before a certain event: see the eleventh plea in Sprye v. *Porter*, 26 L. J. Q. B. 67.

Plea to a particular claim in an indebitatus count, except as to a sum parcel thereof: Lofft v. *Dennis*, 28 L. J. Q. B. 168; E. & E. 474.

Pleas to particular Breaches assigned.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], as to [*or* as to so much of the —— count as relates to] the breach first [*or* secondly, *or as the case may be*] above assigned, says [*here state the substance of the plea, limiting it to the breach pleaded to*].

2. And for a second plea the defendant, as to the breach first [*or* secondly, *or* thirdly, *or as the case may be*] above assigned, says [*here state the substance of the plea, limiting it to the breach pleaded to*].

Plea as to so much of a breach as relates to matters before a certain time: see Winstone v. *Linn*, 1 B. & C. 460.

Plea to Part of a Special Count, and Plea to the Residue (a).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], as to so much of the declaration [*or* first *or other* count] as alleges that [*or*, as charges the defendant with, *or* as relates

(*a*) It is sometimes doubtful whether a particular allegation in the declaration is or is not material and therefore traversable, and it may be thought

to, *here state the part pleaded to*] says [*here state the substance of the plea, limiting it to the part pleaded to, which may be done by referring to that part as* the cause [*or* causes] of action herein pleaded to].

2. And for a second plea the defendant, as to the residue of the declaration [*or* first *or other* count], says [*here state the substance of the plea, limiting it to the part as above*].

Plea as to two sums of Money claimed under different Counts, identifying them.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } 1. The defendant, by *G. H.* his attorney [*or* in person], as to the first count of the declaration, and as to £——, parcel of the money claimed under the second count of the declaration, says that the money claimed under the first count is the same identical £—— as the said £—— parcel of the money claimed under the second count, and that [*here state the substance of the plea, limiting it to the matters pleaded to*].

A like form: Bittleston v. *Timmis*, 1 C. B. 389.

Plea repeating what has been pleaded in a former Plea by reference thereto (*a*).

And for a —— plea the defendant as to [*here state the part of the claim or the count to which the plea is pleaded*], repeats the several allegations contained in the —— plea [except so much thereof as alleges *or* relates to, *etc., stating anything not intended to be repeated*], and says that they are respectively true in substance and fact; and the defendant further says that [*here state the additional matter of defence*].

See like forms: Hammond v. *Dayson*, 15 M. & W. 373; *Shand* v. *Sanderson*, 28 L. J. Ex. 278; *Manning* v. *Phelps*, 10 Ex. 59; *Morant* v. *Chamberlain*, 30 L. J. Ex. 299, 303.

Plea by one of several Defendants (*b*).

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advisable to traverse it in order to avoid the risk of admitting it on the record. In such case the following form of commencement may be used in the plea:—"As to so much of the alleged cause of action as depends upon the allegation that [*here state the allegation traversed*] says that" [*here traverse the allegation*]. As to traverses of such allegations, see *Cutts* v. *Surridge*, 9 Q. B. 1015; *Tallis* v. *Tallis*, 1 E. & B. 397 n. (*a*).

(*a*) This form will be found useful in actions on bills of exchange between remote parties, where a long statement of facts forms the principal ground for several distinct defences, and in other cases where it is necessary to repeat the same facts as parts of different pleas.

Pleas are sometimes also, for the sake of brevity, limited at the commencement by reference to former pleas, thus, "And for a [second] plea the defendant, as to the same causes of action to which the [first] plea is pleaded, says," etc. This form of commencement is objectionable and should not be used without sufficient cause, as it makes it necessary to refer to previous pleas to ascertain what the particular plea is pleaded to, and in case of a demurrer may encumber the demurrer-book with irrelevant matter.

(*b*) Several defendants may, at their discretion, either join in one defence

In the ——.

The —— day of ——, A.D. ——.

F. and another [*or* others] (*a*) ats. *B.* } 1. The defendant *E. F.*, by *G. H.* his attorney [*or* in person], says [*here state the substance of the plea*].

2. And for a second plea the defendant *E. F.* says [*here state the substance of the plea*].

Plea by an infant Defendant who defends by Guardian.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.*, who is admitted by the Court here as the guardian of the defendant to defend for him, he being an infant within the age of twenty-one years, says [*here state the substance of the plea*].

Plea by Husband and Wife sued jointly (*b*).

In the ——.

The —— day of ——, A.D. ——.

F. and wife ats. *B.* } The defendants, by *H. K.* their attorney [*or* in person], say [*here state the substance of the plea*].

Plea by an Executor or Administrator.

In the ——.

The —— day of ——, A.D. ——.

F. executor, etc. (*c*) ats. *B.* } The defendant, by *I. K.* his attorney [*or* in person], says [*here state the substance of the plea*].

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and plead jointly, or sever in their defences and plead distinct pleas. (Co. Lit. 303 *a*; *Morrow* v. *Belcher*, 4 B. & C. 704.) Single pleas by several defendants are not several pleas, requiring leave of the court, or for the purposes of costs or other purposes. (*Cazneau* v. *Morrice*, 25 L. J. Q. B. 126.) If several defendants join in a defence which is a sufficient justification for one, but no justification for the others, the plea is bad as to all. (1 Wms. Saund. 28 *a*.) In such case, therefore, it is necessary for the defendant having a justification to sever in his defence from the others. (See *post*, c. 6, "*Sheriff*.")

(*a*) This is the title of the cause, and should not be altered, although the particular defendant pleading alone does not happen to be that one who gives his name to the cause as being the first named on the record.

(*b*) A married woman cannot appoint an attorney, but where a husband and wife sue or are sued jointly, the husband may appoint an attorney for both. A married woman sued alone must appear in person, and may then plead her coverture in abatement; or if the action is founded upon a contract made during coverture, the coverture may be pleaded in bar. (See *ante*, p. 5.)

(*c*) The character in which the party sues or is sued should be stated in the marginal title of the pleading.

Plea in Abatement (a).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney [*or* in person], prays judgment of the writ and declaration herein, and that the same may be quashed, because he says [*here state the substance of the plea, and conclude:*] and this the defendant is ready to verify; wherefore he prays judgment of the said writ and declaration, and that the same may be quashed, etc.

Plea of Matter of Estoppel.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney [*or* in person], says that the plaintiff ought not to be admitted to say [*here state the allegation or matter to which the estoppel applies*], because he says [*here state the matter of estoppel, and conclude:*] and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to be admitted against his own acknowledgment [*or* deed, *or whatever the matter of estoppel may be*] to say that [*here repeat the allegation or matter to which the estoppel applies*].

Plea on Equitable Grounds (b).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney [*or* in person], for defence on equitable grounds, says [*here state the substance of the plea*].

Plea in Bar to the further Maintenance (c).

A plea in bar to the further maintenance commences and concludes in the ordinary form. The body of the plea must show that the defence arose after action, or it will be deemed to have arisen before. (C. L. P. Act, 1852, s. 68, *post*, p. 388.)

Plea Puis Darrein Continuance (c).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney [*or* in person], says that after the last pleading in this action [*here state the substance of the plea*].

(*a*) The better opinion seems to be that pleas in abatement are not within the sects. 66, 67, of the C. L. P. Act, 1852, and consequently that the formal commencement and conclusion should still be preserved. (Chit. Forms, 9th ed. 456 n. (*b*).) Pleas and replications in estoppel are also still pleaded with a formal commencement and conclusion.

As to the nature of pleas in abatement, see *post*, "*Abatement*," p. 404.

(*b*) The C. L. P. Act, 1854, s. 83, which allows equitable defences to be pleaded, provides "that such plea shall begin with the words 'for defence on equitable grounds,' or words to the like effect."

(*c*) *Pleading defences which have arisen after the commencement of the suit*

Plea Puis Darrein Continuance at Nisi Prius, in a Town Cause.

In the ——.

The —— day of ——, A.D. ——.

F. } And now, at this day, before the Right Honourable ——,
ats. } her Majesty's Chief Justice, assigned to hold Pleas in her
B. } Court of Queen's Bench [*or* Common Pleas, *or in the Ex-*

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and pleas puis darrein continuance.]—Throughout the ordinary pleadings in an action the rights of the parties are considered to remain the same as they were at the commencement. If they are subsequently altered, the new matter must be pleaded by the party desirous of obtaining the benefit of it. (*Rundle* v. *Little*, 6 Q. B. 174, 178.) Thus, payment after the commencement of the action cannot be proved even in mitigation of damages without a plea to that effect. (Ib.; *Nosotti* v. *Page*, 10 C. B. 643; see such plea, *Cook* v. *Hopewell*, 11 Ex. 555.) Any plea of a defence arising after the commencement of the action, from which time costs constitute a part of the damages, must answer the costs or it would be bad unless limited at the commencement so as to except the costs. (*Goodwin* v. *Cremer*, 18 Q. B. 757.) And a plea so generally pleaded as to answer the costs could be supported only by evidence of a payment or other defence involving a satisfaction of the costs. (*Thame* v. *Boast*, 12 Q. B. 808; *Cook* v. *Hopewell*, 11 Ex. 555; 25 L. J. Ex. 71, and see *post*, ch. 5, "*Payment.*")

Formerly matter of defence which arose after the commencement of the suit, if it arose before plea, must have been pleaded formally in bar to the further maintenance of the action, with an allegation of *actionem ulterius non*; and if after plea, then *puis darrein continuance*. (1 Chit. Pl. 7th ed. 688.)

With respect to matter pleaded in bar to the further maintenance of the action, it is now provided by the C. L. P. Act, 1852, s. 68, that "any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action."

With respect to matters pleaded *puis darrein continuance*, the practice of entering continuances has been abolished (see now r. 31, T. T. 1853); but a plea pleaded at the same stage of the proceedings is still known by the former name. And by s. 69 of the C. L. P. Act, 1852, it is provided that "in cases in which a plea *puis darrein continuance* has heretofore been pleaded in banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; and such plea may, when necessary, be pleaded at Nisi Prius, between the 10th of August and 24th of October; but no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or judge shall otherwise order."

A plea *puis darrein continuance* may be pleaded as of right (*Todd* v. *Emly*, 9 M. & W. 606); and in such case it is a waiver of all pleas previously pleaded. (*Dunn* v. *Hill*, 11 M. & W. 470; *Wagner* v. *Imbrie*, 6 Ex. 380.) So a plea *puis darrein continuance* after a demurrer operates as a *retraxit* of the demurrer. (*Solomon* v. *Graham*, 24 L. J. Q. B. 332.)

Formerly it was never allowed to plead a plea in bar of the further maintenance of the action, together with pleas in bar of the action generally. (*Suckling* v. *Wilson*, 4 D. & L. 167; *Gabardi* v. *Harmer*, 6 D. & L. 481.) But we have seen, *ante*, p. 381, n., that now by r. 22, T. T. 1853, "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the plead-

chequer, the Chief Baron of the Court of Exchequer of our Lady the Queen, *or if the trial is before a puisne judge* before Sir ——, one of the Judges of her Majesty's Court of Queen's Bench, *or* Common Pleas, *or* Barons of her Majesty's Court of Exchequer, in the absence and stead of the Right Honourable ——, the Chief Justice *or* Chief Baron of the said Court], comes the defendant by ——, esquire, his counsel, and says that after the last pleading in this action [*here state the substance of the plea*].

Plea Puis Darrein Continuance at Nisi Prius, at the Assizes.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } And now, at this day, before —— and ——, Justices of our Lady the Queen, assigned to take the assizes in and for the county of ——, comes the defendant by ——, esquire, his counsel, and says that after the last pleading in this action [*here state the substance of the plea*].

Plea to Count against Garnishee. (R. G. M. V. 1854, *Sched.* 26.*)* *See ante, p.* 27.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The said *E. F.*, by *K. L.* his attorney, says that he never was indebted to the said *G. H.* as alleged [*or plead such other defence or several defences as in other cases*].

ing such first-mentioned plea." And by r. 23, T. T. 1853, "When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants." Upon a plea *puis darrein continuance* pleaded, the plaintiff may now, therefore, confess the plea, and obtain his costs under the above rules; and the rule has been held to apply to a plea of the plaintiff's conviction of felony pleaded *puis darrein continuance*. (*Barnett* v. *London and North-Western Ry. Co.* 29 L. J. Ex. 334; 5 H. & N. 604.) The plaintiff may reply to the plea or demur, or, with leave of a judge, do both. (*Prince* v. *Nicholson*, 5 Taunt. 665; *Hill* v. *Dunn*, 11 M. & W. 470.)

Instead of pleading *puis darrein continuance* by way of substitution for the former pleas, it is suggested that the defendant might now apply for leave to add the new defence as a plea in bar to the further maintenance. If the existing date of the pleas would lead to any inconsistency, the application should be to withdraw the previous pleas and plead *de novo*, or to amend the date.

As to the mode and time and place of pleading matter which has arisen after the last pleading, see further, Chit. Pr. 11th ed. 907; and Chit. Forms, 9th ed. 461; where see also the form of affidavit required.

Commencements of Replications (*a*).

Replication taking or joining Issue.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff takes [or joins] issue upon the defendant's plea [*or* first, second, and third pleas, *as the case may be*].

(*a*) *Title and date of replications and subsequent pleadings.*]—The replication and subsequent pleadings must be entitled of the proper court, and of the day of the month and the year when the same was pleaded. (C. L. P. Act, 1852, s. 54; *ante*, p. 1, n. (*b*).)

Time for replying, etc.]—By C. L. P. Act, 1852, s. 53, "Rules to reply and plead subsequent pleadings shall not be necessary, and instead thereof a notice shall be substituted requiring the opposite party to reply, rejoin, or as the case may be, within four days, otherwise judgment; such notice to be delivered separately or indorsed on any pleading to which the opposite party is required to reply, rejoin, or as the case may be." If this notice be not given, the opposite party (unless under terms to do so) is not bound to reply, rejoin, etc., within any specified time. (1 Chit. Pr. 11th ed. 299.) (See further as to time for replying, rejoining, etc., and as to obtaining further time, Ib.; and *ante*, p. 373).

Substance or body of the replication, etc.]—The replication is the answer of the plaintiff to the defendant's plea.

The replication, like the plea, either denies some material fact alleged by the defendant, or, confessing the matters of fact alleged in the plea, states new matter which avoids their legal effect.

The defendant may, in like manner, answer the replication by a *rejoinder*. And so the pleadings proceed by *rebutter*, *surrebutter*, etc., until the parties arrive at an issue of fact, or by a demurrer and joinder at any stage, at an issue of law.

By the C. L. P. Act, 1852, s. 77, "A plaintiff shall be at liberty to traverse the whole of any plea, or subsequent pleading of the defendant by a general denial, or admitting some part or parts thereof to deny all the rest, or to deny any one or more allegations."

By s. 78, "A defendant shall be at liberty in like manner to deny the whole or part of a replication or subsequent pleading of the plaintiff."

By s. 79, "Either party may plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect:—

"The plaintiff joins issue upon the defendant's first" [*etc., specifying what or what part*] "plea."

"The defendant joins issue upon the plaintiff's replication to the first" [*etc., specifying what*] "plea."

And such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant."

These three sections (77, 78, 79) have made a great alteration in the previous mode of replying, rejoining, etc. Before these enactments only one material averment in a pleading could, as a general rule, be traversed, without infringing the rule against duplicity in pleading. (Steph. Pl. 6th ed. 306.) The strictness of this rule was, indeed, obviated in some cases by the technical device called the replication *de injuriâ*, whereby the whole of the facts stated in the plea were collectively put in issue. (*Crogate's Case*, 8

Commencement of a Second [or Third] Replication to the same Plea (a).

And for a second [*or* third, *or as the case may be*] replication to the defendant's plea [*or* first *or* second plea, *or as the case may be*] the plaintiff says [*here state the matter in answer to the plea*].

Replication traversing the Plea in Terms or answering it by New Matter in Confession and Avoidance.

In the ——.

B. } The —— day of ——, A.D. ——.
v. } The plaintiff, as to the defendant's —— plea says [*state*
F. } *the matter in answer to the plea*].

Co. 67; *Isaac* v. *Farrar*, 1 M. & W. 65.) But this replication was restricted to cases where the plea consisted of matter of excuse, and, except in the limited form of *de injuriâ absque residuo causæ*, where the excuse did not involve title or interest in land or goods, commandment or authority of the plaintiff, or matter of record; it was wholly inapplicable where the plea consisted of matter of satisfaction or discharge. The use of it was consequently often questionable and dangerous, as the great number of cases on the subject in the reports shows. It has now become so entirely obsolete that the learning concerning it is rendered wholly superfluous. All the advantages of this replication may now be obtained in every case at this stage of the pleadings, and a like advantage at all subsequent stages, by joining issue as provided by the above enactments. At the same time the issue under the new form of replication does not include any matters which could not have been separately traversed before, as not forming a substantial part of the defence; it only enables the party to put in issue collectively all the matters, any one of which he could previously have traversed separately. (*Glover* v. *Dixon*, 9 Ex. 159.)

At any stage of the pleadings, whenever the party pleading has to reply, rejoin, etc., to a traverse properly taken, he *must* join issue upon it. (Steph. Pl. 6th ed. 202.)

As to replying several matters, see *ante*, p. 378 (*a*). A plaintiff has been allowed to plead a special replication together with a general traverse of the plea, though it does not raise a distinct defence, where the special replication enables the defendant to raise the question in dispute by demurrer. (*Williams* v. *African Steam Co.* 1 H. & N. 19.)

As to replying and demurring together, see C. L. P. Act, 1852, s. 80; *post*, c. 7, "*Demurrer*."

It will be observed that the C. L. P. Act, 1852, uses the terms *take* and *join* issue indifferently; the one in the body of the Act, the other in the schedule; and in practice it is not unusual to join issue on traverses and to take issue on pleas in confession and avoidance. (Chit. Forms, 9th ed. 118, (*b*). But this is an useless distinction (see Smith L. C. 5th ed. 120), and it is better to adopt one or other expression only and apply it to the whole of the pleas at once, as in the above form, particularly when some of them are traverses and others pleas in confession and avoidance intermixed. By this means the issues will be preserved in the same order as the pleas, which is more convenient in framing the *postea* and throughout the proceedings. The course sometimes adopted of first joining issue on the first, third, and last pleas, and then taking issue on the second, fourth, etc., pleas, may lead to confusion.

(*a*) It is not usual to number replications in the margin, but if several replications are pleaded to the same plea, the second and subsequent ones should be numbered at the commencement, as above, with reference to the particular plea to which they are addressed.

Replication to Part of a Plea.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff, as to so much of the defendant's plea [*or* —— plea] as relates to [*or* as alleges that, *here state the part replied to*] takes [*or* joins] issue thereon [*or* says, *as the case may be*].

Replication expressly admitting Part of the Plea.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff, as to the defendant's —— plea, admits so much thereof as [*state the part admitted in the terms of the plea*], and for a replication in this behalf says [*here state the substance of the replication*].

Replications in an Action by Husband and Wife, with a Count by Husband alone.

In the ——.

The —— day of ——, A.D. ——.

B. and Wife v. *G.* } The plaintiffs, as to the defendant's —— plea, say [*here state the matter of the replication to the plea to the count at the suit of both plaintiffs*].

And the plaintiff *A. B.* as to the defendant's —— plea, says [*here state the matter of the replication to the plea to the count at the suit of the husband alone*].

Replication to a Plea in Abatement.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff says that the said writ and declaration ought not to be quashed, because he says [*here state the denial in the terms of the plea traversed, or the new matter if in confession and avoidance, see forms, post, and conclude, if the replication be by way of traverse :*] and this the plaintiff prays may be inquired of by the country [*or if the answer be by way of confession and avoidance*, and this the plaintiff is ready to verify ; wherefore he prays judgment if the said writ and declaration ought to be quashed].

Replication to a Plea of Matter of Estoppel.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff, as to the defendant's —— plea, says that the plaintiff ought to be permitted to say [*here state the allegation or matter to which the plea is pleaded*], because he says [*here state the matter of the replication, and if the replication is a traverse conclude*], and of this the plaintiff puts himself upon the country ; [*or if the replication be by way of confession and avoidance conclude thus :* and this the plaintiff is ready to verify ; wherefore he prays judgment that he ought to be permitted to say *here repeat the allegation or matter to which the plea is pleaded.*]

Replication of Matter of Estoppel.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* The plaintiff, as to the defendant's —— plea says, that the defendant ought not to be admitted to plead the said plea, because he says: [*here state the matter of estoppel, and conclude:*] and this the plaintiff is ready to verify; wherefore he prays judgment if the defendant ought to be admitted against his own acknowledgment [*or* deed, *or whatever the matter of estoppel may be*] to plead the said —— plea.

Rejoinder to replication of matter of estoppel: Doe v. *Wright*, 10 A. & E. 763; *Darlington* v. *Pritchard*, 4 M. & G. 783, 787.

Replication on Equitable Grounds (a).

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* The plaintiff, as to the defendant's —— plea for replication on equitable grounds, says [*here state the substance of the replication*].

COMMENCEMENTS OF NEW ASSIGNMENTS (*b*).

New Assignment of other Causes of Action than those Pleaded to.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* The plaintiff, as to the defendant's —— plea [*or* —— and —— pleas], says, that he sues not for the causes of action therein admitted, but for [*here state the causes of action newly assigned*].

New Assignment where the Plaintiff also replies to the same Pleas.

[*After the replication add:*] And the plaintiff, as to the defendant's —— plea [*or* —— and —— pleas], further says, that he sues not only for the causes of action therein admitted, but also for [*here state the causes of action newly assigned*].

New Assignment to two Pleas, one of which is also replied to and the other not.

[*After the replication add:*] And the plaintiff, as to the defendant's —— and —— pleas, further says, that he sues not for the causes of action in the —— plea [*the plea not replied to*] admitted,

(*a*) The C. L. P. Act, 1854, s. 85, enacts that "The plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words 'for replication on equitable grounds,' or words to the like effect."

(*b*) As to new assignments, see *post*, "*New Assignment;*" and as to the forms above given, see C. L. P. Act, 1862, sched. B, 55–57.

but for the causes of action in the —— plea [*the plea replied to*] admitted, and also for [*here state the causes of action newly assigned.*]

Plea to a New Assignment.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, as to the plaintiff's new assignment to the —— plea [*or* —— and —— pleas], says [*here state the substance of the plea*].

COMMENCEMENTS OF REJOINDERS.

Rejoinder taking or joining Issue.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant takes [*or* joins] issue upon the plaintiff's replication [*or* —— replication] to the defendant's plea [*or* —— plea].

Rejoinder traversing the Replication in terms, or answering it by New Matter in Confession and Avoidance.

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, as to the replication [*or* —— replication] to the plea [*or* —— plea], says [*here state the traverse or the new matter in answer to the replication*].

COMMENCEMENTS OF SURREJOINDERS.

Surrejoinder taking or joining Issue.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff takes [*or* joins] issue upon the defendant's rejoinder [*or* —— rejoinder] to the plaintiff's replication [*or* —— replication] to the defendant's plea [*or* —— plea].

Surrejoinder traversing the Rejoinder in Terms, or answering it by New Matter in Confession and Avoidance.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* } The plaintiff, as to the rejoinder [*or* —— rejoinder] to his replication [*or* —— replication] to the plea [*or* —— plea] says [*here state the traverse or the new matter*].

Rebutters and Surrebutters.

The *rebutters* and *surrebutters*, should the pleadings extend to that length, follow the same forms as the *rejoinders* and *surrejoinders*.

Issue.

Form of an Issue in general. (*R. H. T.* 1853, *Sched. No.* 1.)

In the Queen's Bench [*or* Common Pleas *or* Exchequer of Pleas, *as the case may be*].

The —— day of ——, A.D. [*date of declaration*].

(*The venue.*) *A. B.*, by *C. D.* his attorney [*or* in person, *as the case may be, and as in the declaration*], sues *E. F.*, who has been summoned to answer the said *A. B.* by virtue of a writ issued on the —— day of ——, A.D. —— [*the date of the first writ*], out of her Majesty's Court of Queen's Bench [*or* Common Pleas *or* Exchequer of Pleas, *as the case may be*]. For [*etc. copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus:*]

Therefore let a jury come, etc.

For other forms of issue, see Chitty's Forms, 9th ed. 125.

CHAPTER V.

PLEAS AND SUBSEQUENT PLEADINGS IN ACTIONS ON CONTRACTS.

General Issue (*a*).

(*a*) *The General Issue.*]—There are three pleas usually spoken of as general issues in actions on contracts. When the action is brought to recover a simple contract debt and the declaration is framed in an indebitatus count, the plea is *nunquam indebitatus;* when it is brought for the breach of a simple contract alleged in the declaration, the plea is *non assumpsit;* when founded on a specialty contract, the plea is *non est factum.* Besides these, when the action is on a contract of record there is the plea of *nul tiel record;* and when it is founded on a bill or note, to which *non assumpsit* cannot be pleaded, the most analogous plea to it is the denial in terms of the contract of the defendant, namely, that he *did not accept*, or *did not indorse*, etc.

There are now no general issues in the sense in which the term was understood before the pleading rules of H. T. 1832. The general issue was then not strictly a traverse. It amounted in effect to a general denial of the defendant's liability, under which it was competent for him not only to put the plaintiff to the proof of the whole of his case, but also to raise in answer to it almost every sort of defence on his own part. The practice of thus pleading at large, and leaving the particular questions in dispute to appear for the first time on the evidence, was highly inconvenient. The plaintiff was obliged to come to trial prepared with evidence to prove his whole case, whether really disputed or not, and after all he might be surprised by a defence of which he had no distinct notice, and be wholly unprepared to meet it; or it might appear for the first time at the trial that the point in dispute was a question not of fact but of law.

The new rules of H. T. 1832, were framed with the view to obviate these inconveniences, and to carry out more efficiently the real objects of pleading; namely, to separate questions of law from questions of fact, so as to refer each at once to its proper tribunal; to narrow the issue to the real point in dispute; and to give notice to each party of the case relied on by his adversary, so that he may come to trial prepared to meet it. The new rules of H. T. 1832, were substantially the same in this respect as the present rules of pleading of T. T. 1853. Under these rules the general issue became properly a traverse. All matters in confession and avoidance must be specially pleaded (r. 8, 12, 17, T. T. 1853). And moreover the effect of the general issue as a traverse was materially restricted.

It is no longer a denial of the defendant's liability to the action generally, but is limited to a traverse of the most essential or characteristic allegation in the declaration according to the particular form of the action; although in some cases it assumes a conventional form of denial, and is not a traverse in terms of any express allegation.

It will be seen that some forms of general issue are adapted to traverse the right and some to traverse the injury. And it was one chief policy of

Plea of the General Issue to Indebitatus Counts. (C. L. P. Act, 1852, Sched. B. 36) (a).

That he [*or* they] never was [*or* were] indebted as alleged. [*This*

the new rules, that the alleged right and the alleged wrong should be separately pleaded to. (Per Crompton, J., *Kenrick* v. *Horner*, 26 L. J. Q. B. 214; 7 E. & B. 628.) In actions for breaches of contract the general issue traverses the right or contract only, and not the breach. (*Smith* v. *Parsons*, 8 C. & P. 199; *Warre* v. *Calvert*, 7 A. & E. 143.) In actions for wrongs independent of contract, the general issue traverses the injury only and not the right. (As to a denial of the breach in actions on contracts, see *ante*, p. 375.)

It is sometimes doubtful whether a declaration is founded upon a contract, or upon a wrong independent of a contract. (See *ante*, "*Carriers*," p. 101, n. (*a*).) Such cases are provided for by the C. L. P. Act, 1852, s. 74, which, after reciting that certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the forms of pleas in such actions, and that it is expedient to preclude such doubts, enacts "that any plea which shall be good in substance, shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." In such a case, therefore, the defendant may, without objection, plead either *non assumpsit* or *not guilty*; but the effect of these pleas would not be the same: the one would deny the contract, retainer, or bailment, and admit the breach; whereas the other would admit the contract, etc., and deny the breach.

Before the C. L. P. Act, 1852, it was informal and wrong to use a traverse in terms where the general issue was applicable, and would have covered the common traverse. (*Sutherland* v. *Pratt*, 11 M. & W. 296; *Cleworth* v. *Pickford*, 7 M. & W. 314.) But by sect. 76 of that Act, "a defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse." So, formerly, a defence amounting argumentatively to the general issue, must have been pleaded in that form. (*Sutherland* v. *Pratt*, 11 M. & W. 296; *Aylesbury Ry. Co.* v. *Mount*, 7 M. & G. 898; *Lyall* v. *Higgins*, 4 Q. B. 528; *Nash* v. *Breeze*, 11 M. & W. 352.) The abolition of special demurrers (C. L. P. Act, 1852, s. 51) has removed this difficulty. No objection can now be made to an argumentative plea of the general issue, unless it is so framed as to prejudice, embarrass, or delay the fair trial of the action, in which case the plaintiff may apply to have it struck out or amended under sect. 52 of the C. L. P. Act, 1852. The learning, however, which is to be found in the books since the rules of H. T. 1832, on the applicability and effect of the general issues, is scarcely less important now than it was before the late Act. Whenever a defence is admissible under the general issue, it is still clearly the interest of the defendant to plead it in that form. By this means he may avoid disclosing his particular ground of defence prematurely to, perhaps, a dishonest plaintiff; he will gain the advantage of throwing the greatest burden of proof on his adversary, and he may avail himself, not only of the particular defence he proposes to rely on, but also of any other ground which may arise at the trial, and which falls within the scope of the general issue. It must be borne in mind that the defendant will not, in general, be allowed to plead the general issue, together with an argumentative plea amounting to it, or a particular traverse comprised under it. (*Ante*, "*Pleading several Matters*," p. 378.)

(*a*) *Never indebted.*]—The plea of *nunquam indebitatus* is now the only general issue to indebitatus counts. Formerly, when a plaintiff framed his

plea is applicable to declarations like those numbered 1 *to* 14 *in Sched. B. to the C. L. P. Act,* 1852. *It is generally applicable to all indebitatus counts.*]

declaration to recover the amount of a debt in *indebitatus assumpsit*, alleging the debt as inducement, and the promise to pay it implied by law as the gist of the action (*ante*, p. 28, n. (*a*)), the plea of *non assumpsit* was the general issue to such a count; and the scope and effect of it according to the rules of H. T. 1832, were analogous to those of *nunquam indebitatus* under the same rules and under those of H. T. 1853. It is important to notice this as the cases decided on the general issue in actions of debt on simple contract and of *indebitatus assumpsit* mutually illustrate each other.

It is also proper, as a guide to the present effect of the general issue, to advert to the change of form from *nil debet* to *nunquam indebitatus*, which was first effected by the rules of H. T. 1832. The old general issue was *nil debet*, and the form of expression necessarily suggests how comprehensive it was as regards the defences included under it. In order at once to put an end to this, and to mark the more limited effect of the plea by the form of it, the present general issue, *nunquam indebitatus*, was substituted for *nil debet*.

The form of this plea is given by the schedule to the C. L. P. Act, 1852, and is thereby made applicable to *indebitatus* counts. And by r. 6, T. T. 1853, it is provided, that "to causes of action to which the plea of '*never was indebted*' is applicable, as provided in the above schedule, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible: and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises; *ex. gr.* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff."

By r. 11, T. T. 1853, "the plea of *nil debet* shall not be allowed in any action." The new rules of Will. IV. contained a rule in precisely the same terms as the above, which was held not to apply to the plea of *nil debet* by statute given in penal actions by the 21 Jac. I. c. 4, s. 4; because the statute 3 & 4 Will. IV. c. 42, s. 1, giving authority to the judges to make those rules, expressly provided that no such rule should deprive any person of the power of pleading the general issue by statute. (*Earl Spencer* v. *Swannell*, 3 M. & W. 154; *Jones* v. *Williams*, 4 M. & W. 375.) The present rules were made under the authority given by the statutes 13 & 14 Vict. c. 16, and the C. L. P. Act, 1852, s. 223, which contain no similar proviso. Hence it seems that the present rule relating to the plea of *nil debet* is universal, and abolishes such plea in all actions.

The *indebitatus* counts are applicable whenever a simple contract, whether express or implied from circumstances, results in a present debt or liquidated demand in money due on an executed consideration (see *ante*, p. 29). The plea of "never indebted" denies the original existence of the debt, and under an issue raised upon it the plaintiff is bound to prove by an express contract, or by matters of fact from which it may be implied, that a debt existed as alleged. The *indebitatus* counts are only applicable to simple contract debts; therefore the plaintiff cannot maintain this issue by proof of a contract made by deed (*Edwards* v. *Bates*, 7 M. & G. 590); and the defendant may show under it that a deed was executed or a bond given at the time of the contract: but the defence that the contract subsequently merged in a specialty must be specially pleaded. (*Weston* v. *Foster*, 2 Bing. N. C. 693; *Mathew* v. *Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150.)

If the plaintiff relies on an express contract which is subject to any conditions before the absolute liability of the defendant attaches, he is bound

to prove under the general issue the happening or performance of those conditions. (*Alexander* v. *Gardner*, 1 Bing. N. C. 671; *Hudson* v. *Bilton*, 26 L. J. Q. B. 27; 6 E. & B. 565.) And on these points the defendant may, under the same issue, give in evidence any facts tending to rebut the proofs of the plaintiff. If the plaintiff relies on matters of fact from which the debt is implied, as the delivery and acceptance of goods, the performance of work, etc., he may under this issue prove any circumstances material to support the implication. And the defendant may give in evidence, under the same issue, any matter tending to alter the legal effect of such circumstances. (*Gregory* v. *Hartnoll*, 1 M. & W. 183.) Thus, he may show that the goods accepted, the work done, etc., were the subject of an express contract, and that, according to the terms and conditions of that contract, no present or absolute debt has accrued due.

By r. 8, T. T. 1853, "In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, etc., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

The effect of *nunquam indebitatus* is illustrated by the above examples given in the rules of H. T. 1853, and by numerous decisions, to some of which it will be convenient to refer.

In actions *for goods sold*, it has been held that under this issue the defendant may prove that the goods were sold on terms of credit which has not expired (*Broomfield* v. *Smith*, 1 M. & W. 542), or were delivered under a contract of barter (*Harrison* v. *Luke*, 14 M. & W. 139), or were to be paid for from a particular source, out of moneys passing through the plaintiff's hands, to which he has not resorted (*Garey* v. *Pyke*, 10 A. & E. 512); that the goods were sold with a warranty, and did not agree with it, and were of no value or of no more value than a sum already paid (*Dicken* v. *Neale*, 1 M. & W. 556); that the goods were altogether worthless or did not accord with the contract in quality and description. (*Cousins* v. *Paddon*, 2 C. M. & R. 547; *Dawson* v. *Collis*, 10 C. B. 523.) And if the defendant has accepted the goods notwithstanding their deficient quality, he may under the general issue give in evidence the deficiency in value in abatement of the contract price. (*Mondel* v. *Steel*, 8 M. & W. 858.) In an action for the price of a machine sold and delivered, the defendant was allowed to prove under the general issue that it was sold on the condition, that if it did not work properly nothing should be paid for it, and that it did not. (*Grounsell* v. *Lamb*, 1 M. & W. 352.)

Under "never indebted" to the common count for goods sold, or to any other common counts, the defendant may prove that the plaintiff was his partner in the transaction. (*Payne* v. *Hales*, 5 M. & W. 598; *Brown* v. *Tapscott*, 6 M. & W. 123; *Worrall* v. *Grayson*, 1 M. & W. 166.) Where the plaintiff proves that the goods were supplied to the defendant's wife, the defendant may prove under the general issue that she was living in adultery at the time that the goods were supplied, as this disproves the agency of the wife in pledging his credit. (*Symes* v. *Goodfellow*, 4 Dowl. 642.)

The defence that the plaintiff had no title to the goods at the time of the sale, where available at all (see *ante*, p. 229, n.), must be specially pleaded. (*Walker* v. *Mellor*, 11 Q. B. 478.) Payment of a debt actually accrued must be specially pleaded, and cannot be proved under the general issue (r. 14, T. T. 1853). But where a transaction is for ready money, and the article bought is paid for *eo instanti* on the purchase being made, there is no debt and therefore no occasion to plead payment. (*Dicken* v. *Neale*, 1 M. & W.

556; *Bussey* v. *Barnett*, 9 M. & W. 312; *Wood* v. *Bletcher*, 4 W. R. Ex. 566; but see *Littlechild* v. *Banks*, 7 Q. B. 739; and per Lord Campbell, *Timmins* v. *Gibbins*, 18 Q. B. 722, 726.) So, where there has been a prepayment, or where an antecedent debt from the defendant to the plaintiff is by the agreement taken as part of the price of the goods sold or work done, such defence may be proved under the general issue. (*Smith* v. *Winter*, 12 C. B. 487.) So, where the execution of a transfer or conveyance is the consideration for the payment of money, which by the deed itself is acknowledged to be paid. (*Baker* v. *Heard*, 5 Ex. 959; *Baker* v. *Dewey*, 1 B. & C. 704; and see per Parke, B., *Hallen* v. *Runder*, 1 C. M. & R. 266, 271.)

In actions *for work done*, under the general issue the defendant may prove that the work was done by the plaintiff on an express contract to do it without fee or reward (*Jones* v. *Nanny*, 5 Dowl. 90; *Jones* v. *Reade*, 5 Dowl. 216), or under a contract to take payment in goods (*Collingbourne* v. *Mantell*, 5 M. & W. 289), or in other work to be done by the defendant (*Bracegirdle* v. *Hinks*, 9 Ex. 361); that it was done under an express contract that the defendant should be entitled to deduct for the plaintiff's negligence in the work (*Cleworth* v. *Pickford*, 7 M. & W. 314); that the work was done in a vain endeavour to cure a chimney from smoking, on the terms that the plaintiff should not be paid unless the work was successful (*Hayselden* v. *Staff*, 5 A. & E. 153); that it was done under an express contract that the plaintiff should not be paid until the delivery of a certificate (not delivered before action) of the works having been performed according to a specification (*Milner* v. *Field*, 5 Ex. 829; and see *Morgan* v. *Birnie*, 9 Bing. 672; *Grafton* v. *Eastern Co. Ry. Co.*, 8 Ex. 699); that the work was done so unskilfully as to be useless. (*Hill* v. *Allen*, 2 M. & W. 283; *Bracey* v. *Carter*, 12 A. & E. 373; *Symes* v. *Nipper*, *ib.* 377 (n.); *Lewis* v. *Samuel*, 8 Q. B. 685; *Cox* v. *Leech*, 26 L. J. C. P. 125; *Long* v. *Orsi*, 26 L. J. C. P. 127.) Under this issue to the common count for work done, the defendant may show that he himself did a portion of the work. (*Turner* v. *Diaper*, 2 M. & G. 241; *Newton* v. *Forster*, 12 M. & W. 772.)

In an action *for money lent*, the defendant may show under *nunquam indebitatus* that it was originally lent and secured on a covenant under seal (*Mathew* v. *Blackmore*, 26 L. J. Ex. 150); but if the loan was originally a simple contract debt, which has been merged in a specialty, a plea in confession and avoidance is necessary. (*Weston* v. *Foster*, 2 Bing. N. C. 693.)

In actions *for money paid*, the defendant may, under the general issue, rebut any facts which tend to show that the money was paid at his request, either express or implied. (*Ante*, p. 34, n. (*b*).) He may prove that the money was paid by the plaintiff on the terms that it was not to be repaid until a future time, which had not arrived. (*Maude* v. *Meesham*, 6 Dowl. 570.) He may show that the money was paid in respect of partnership transactions. (*Brown* v. *Tapscott*, 6 M. & W. 123; *Worrall* v. *Grayson*, 1 M. & W. 166; and see *Morgan* v. *Pebrer*, 3 Bing. N. C. 457.)

In answer to the common count *for money received*, the defendant may under this plea prove any facts tending to show that the money sought to be recovered was never received or held by the defendant to the use of the plaintiff (*Owen* v. *Challis*, 6 C. B. 115; *Coupland* v. *Challis*, 2 Ex. 682); and he may set up any contract inconsistent with the immediate liability charged in the count, as a contract giving the defendant a lien on the money. (*Williams* v. *Vines*, 6 Q. B. 355; *Brownrigg* v. *Rae*, 5 Ex. 489.)

To a count *on accounts stated*, the defendant may prove under *nunquam indebitatus* that the account stated was incorrect (*Thomas* v. *Hawkes*, 8 M. & W. 140; and see *Dails* v. *Lloyd*, 12 Q. B. 531); or that it was stated respecting a debt for which there was no consideration (*French* v. *French*, 2 M. & G. 644; *Clarke* v. *Webb*, 1 C. M. & R. 29); or the consideration for which had failed (*Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C.

Plea of the General Issue to Special Counts on Simple Contracts.
(*C. L. P. Act*, 1852, *Sched. B.* 37.) (*a*)

That he did not promise as alleged. [*The plea by several defendants would be*, that they did not promise as alleged; *the plea by*

B. 616); or respecting a debt for which the defendant was not liable. (*Petch* v. *Lyon*, 9 Q. B. 147; and see *Wells* v. *Girling*, 8 Taunt. 737; *Pierce* v. *Evans*, 2 C. M. & R. 294.) The defendant cannot prove under this issue that a subsequent account was stated, in which the balance was in his favour, but in such case must plead the payment or set-off or other transaction by which the account has been altered. (*Fidgett* v. *Penny*, 1 C. M. & R. 180.)

As to the effect of the plea of "never indebted" in other cases, see also the various titles throughout the present chapter.

(*a*) *Non Assumpsit.*]—The above plea is commonly called the plea of *non assumpsit* (*ante*, p. 396, n.). It is given in the schedule B to the C. L. P. Act, 1852, with a note stating that it is applicable to declarations on simple contracts, not on bills and notes, such as those numbered 19 to 22 in that schedule, and that it would be unobjectionable to use "did not warrant," "did not agree," or any other appropriate denial.

By r. 6, T. T. 1853, "In all actions on simple contracts except as hereinafter excepted" (that is to say, actions in the form of indebitatus counts and actions upon bills of exchange and promissory notes, in which it is inadmissible), "the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged, may be implied by law: *Exempli gratiâ;* in an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach."

By r. 8, T. T. 1853, "In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, etc., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

Besides the above rules, numerous decisions have illustrated the effect of the plea of *non assumpsit*, to some of which it will be convenient to refer.

The inducement or prefatory allegations in the declaration are not put in issue by *non assumpsit*. Thus, in *De Pinna* v. *Polhill*, 8 C. & P. 78, where the declaration stated that the plaintiff had composed an opera, and that in consideration that the plaintiff would sell his copyright in it, the defendant undertook to buy it, it was held that under the general issue the defendant could not show that the plaintiff did not compose the opera. (And see *Shilcock* v. *Passman*, 7 C. & P. 289.) But the plaintiff must take care not to import the prefatory averments into the statement of the consideration, as by the words "in consideration of the premises," or they may by this means

one of several defendants would be, that he did not promise as alleged, *or*, that the defendants did not promise as alleged.]

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be put in issue by *non assumpsit*. (*Bell* v. *Welch*, 9 C. B. 154.) Prefatory allegations which are immaterial are not admitted by this plea. (*Bennion* v. *Davison*, 3 M. & W. 179.)

The issue under *non assumpsit* is not supported by proof of a promise *under seal* (*Filmer* v. *Burnby*, 2 M. & G. 529; *Edwards* v. *Bates*, 7 M. & G. 590); and under this issue the defendant may show that the alleged contract was so made (*Ib.*; *Weston* v. *Foster*, 2 Bing. N. C. 693); but where there was originally a valid simple contract, the defendant cannot under a plea of *non assumpsit* set up the defence that it has been subsequently merged in a contract by deed. (*Filmer* v. *Burnby*, 2 M. & G. 529.)

Non assumpsit puts in issue both the promise and the consideration for it as alleged. (*Raikes* v. *Todd*, 8 A. & E. 846; *Beech* v. *White*, 12 A. & E. 670; *Sutherland* v. *Pratt*, 11 M. & W. 296; *Weedon* v. *Woodbridge*, 13 Q. B. 462, 470.) It is therefore inexpedient, and would formerly have been wrong, to traverse the consideration separately. (*Lyall* v. *Higgins*, 4 Q. B. 528; *Wade* v. *Simeon*, 2 C. B. 548; *Raikes* v. *Todd*, 8 A. & E. 846.) Under this plea the defendant may prove that the agreement signed by him was only signed on condition that it should not operate as an agreement until the happening of an event which has not occurred, as, that some third party should approve of the subject of the agreement (*Pym* v. *Campbell*, 25 L. J. Q. B. 277; 6 E. & B. 370); or that the other party should sign the agreement or a counterpart (*Furness* v. *Meek*, 27 L. J. Ex. 34; *Liverpool Borough Bank* v. *Eccles*, 28 L. J. Ex. 122); or, that some third party should join in signing the agreement (*Boyd* v. *Hind*, 25 L. J. Ex. 246; 1 H. & N. 938).

Any qualification or condition of the contract not stated in the declaration may be taken advantage of as a variance under this issue. (*Brind* v. *Dale*, 2 M. & W. 775; *Nash* v. *Breeze*, 11 M. & W. 352; *Kemble* v. *Mills*, 1 M. & G. 757; *Sharland* v. *Liefchild*, 4 C. B. 529; *Weedon* v. *Woodbridge*, 13 Q. B. 462.) So also the defence that the real contract was inconsistent with the one alleged. (*Morgan* v. *Pebrer*, 3 Bing. N. C. 457; *Mounsey* v. *Perrott*, 2 Ex. 522.) As in an action on a policy that there were terms restrictive of the risk as stated in the declaration contained in a memorandum annexed to the policy. (*Heath* v. *Durant*, 12 M. & W. 438.) So also the defendant may show that the contract alleged was in fact modified by an usage of trade. (*Smith* v. *Dixon*, 7 A. & E. 1; *Whittaker* v. *Mason*, 2 Bing. N. C. 359; *Metzner* v. *Bolton*, 9 Ex. 518.) But it is not sufficient for the defendant to prove terms of the contract omitted in the declaration which do not affect the promise and liability charged; as such terms being immaterial need not be stated in the declaration. (*Clark* v. *Morrell*, 1 M. & G. 841.)

Where the declaration states the contract according to its legal effect, and the defendant admits the contract in fact but disputes the construction put upon it, it is often advisable to set out the contract *verbatim* in the plea, in order that the legal construction may be settled upon a demurrer to the plea. (See C. L. P. Act, 1852, s. 56; *ante*, p. 376; *Sim* v. *Edmands*, 15 C. B. 240.) Where the count set out a written contract *verbatim*, and it was pleaded that the contract was made "on the conditions and subject to the terms that," etc., the plea was held bad as seeking to vary the terms of a written contract by extrinsic evidence. (*Canham* v. *Barry*, 15 C. B. 597. See bills of exchange pleaded *verbatim*, *Yates* v. *Nash*, 29 L. J. C. P. 306.)

It has been seen above that all matters in confession and avoidance, as defined by the 8th rule, must be made the subject of special pleas. The performance of the consideration when executory, or of any conditions precedent to the right of action, are not put in issue by *non-assumpsit*, and the non-performance of them must be pleaded by way of traverse. (And see C. L. P. Act, 1852, s. 57, and *post*, p. 483.)

As to when the defence that a written contract has been altered in a ma-

Plea of the General Issue to a Count upon a Deed. (*C. L. P. Act, 1852, Sched. B.* 38.)

That the alleged deed [*or* bond] is not his deed (*a*).

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terial part must be specially pleaded, see *post*, p. 420, n. (*a*). The illegality of the contract, whether in respect of the consideration or of the promise, must be specially pleaded. (*Fenwick* v. *Laycock*, 1 Q. B. 414; *Daintree* v. *Hutchinson*, 10 M. & W. 85; *Bull* v. *Chapman*, 22 L. J. Ex. 257.) And it makes no difference though this illegality appears on the plaintiff's own case at the trial. (*Fenwick* v. *Laycock*, 1 Q. B. 414.) But a defence on the ground that the contract was made in a foreign country, and was illegal and not binding according to the law of that country, may be set up under *non assumpsit*, because the foreign law is taken cognizance of by English courts only as a matter of fact. (*Hannuic* v. *Goldner*, 11 M. & W. 849.)

The Statute of Frauds need not be specially pleaded, as the general issue throws on the plaintiff the burden of proving a contract in fact. (*Buttemere* v. *Hayes*, 5 M. & W. 460; *Eastwood* v. *Kenyon*, 11 A. & E. 441; *Fricker* v. *Thomlinson*, 1 M. & G. 772; *Leaf* v. *Tuton*, 10 M. & W. 397.) So objections under the stamp laws are taken on the evidence (*Mason* v. *Bradley*, 11 M. & W. 590; *Walliss* v. *Broadbent*, 4 A. & E. 877), and do not form the proper subject of a plea, unless the instrument is such that the stamp cannot subsequently be applied. (*Bradley* v. *Bardsley*, 14 M. & W. 873.) So the defence that the contract is made without the proper formalities, as where made by a body authorized to contract only under seal, and the contract has not been so made. (*Frend* v. *Dennett*, 27 L. J. C. P. 314.)

(*a*) *Non est factum.*]—By r. 10, T. T. 1853, "in actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." And by r. 12, "all matters in confession and avoidance shall be pleaded specially, as above directed, in actions on simple contracts." (*Ante*, p. 401.)

The plea of *non est factum* puts in issue that the defendant executed the deed alleged in the declaration. Under this issue therefore he has the benefit of any variance between the deed as alleged and the deed produced in evidence. (*Trott* v. *Smith*, 12 M. & W. 688.) Thus, where a deed is pleaded as a release, *non est factum* puts in issue not only the execution of the deed, but also its effect as a release. (*North* v. *Wakefield*, 13 Q. B. 536.) And this is the proper plea, by which to dispute the alleged effect of the deed. (*Smith* v. *Scott*, 28 L. J. C. P. 325; 6 C. B. N. S. 770.)

Under this issue the defendant may show that he delivered the deed as an *escrow*, to take effect upon an event which has not happened. (*Millership* v. *Brookes*, 29 L. J. Ex. 369.) If the covenantee or obligee refuse to accept the deed, the deed is void *ab initio*, and the proper plea is *non est factum*. (*Whelpdale's Case*, 5 Co. Rep. 119 *a*; and see per Holt, C. J., *Wankford* v. *Wankford*, 1 Salk. 299, 307.) One of two joint covenantors or obligors sued severally cannot object to the non-joinder under *non est factum*, but must plead it in abatement. (*Whelpdale's Case*, 5 Co. Rep. 119 *a*.) If the deed is voidable, as by reason of infancy, fraud, duress, etc., or if the deed be void for illegality, or has been avoided by a subsequent alteration in it, the defence must be specially pleaded. (*Whelpdale's Case*, 5 Co. Rep. 119 *a*; and see r. 10, 12, T. T. 1853, *supra*.) Under this issue the defendants, a corporation, were allowed to show that the execution of a deed having their seal was void, because not authorized by the provisions of their Act of Incorporation. (*Hill* v. *Manchester & Salford Waterworks Co.*, 5 B. & Ad. 866; see a special plea to the same effect, *Royal British Bank* v. *Turquand*, 24 L. J. Q. B. 327; 25 L. J. Q. B. 317; 6 E. & B. 327.)

ABATEMENT, PLEAS IN. (*a*)

Plea of the Non-joinder of a Co-contractor as Defendant.

(*Commence with the form ante, p.* 387.) That the alleged promise, if any, was made [*or* debt, if any, was contracted] by the

(*a*) *Pleas in abatement.*]—A plea in abatement, without admitting or denying the cause of action, sets up some matter of fact, the legal effect of which is to preclude the plaintiff from recovering upon the writ and declaration as *at present* framed. Of this kind are pleas stating that the plaintiff or the defendant are under some personal disability of suing or being sued; as, pleas of the coverture of the plaintiff or of the defendant; that the plaintiff is an alien enemy; that the plaintiff or the defendant cannot sue or be sued alone, as being joint parties with others to the cause of action, etc. Formerly, misnomer of the plaintiff or defendant could be objected to by plea in abatement, but by 3 & 4 Will. IV. c. 42, s. 11, no plea in abatement for misnomer shall be allowed in any personal action, and see *ante*, "*Misnomer*," p. 4.

Pleas in abatement must give the plaintiff a better writ, that is, they must state all such matters as may be necessary to enable the plaintiff to amend his proceedings or to frame them more correctly in another action. Precedents of the pleas in abatement of most common occurrence are given above. A plea in abatement must be pleaded within four days after the delivery or filing of the declaration, unless the time is extended by leave of the court or a judge, and must be verified by affidavit.

A plea in abatement is not an issuable plea (see *ante*, p. 378), and matter in abatement arising after the commencement of the suit cannot be pleaded by a defendant who is under terms to plead issuably. (*Shepeler* v. *Durant*, 14 C. B. 582.)

As to the practice relating to pleas in abatement, see 2 Chit. Pr. 11th ed. 897; Chit. Forms, 9th ed. 456.

The misjoinder or non-joinder of parties to actions on contracts.]—If parties suing or sued in their own right are improperly joined or omitted as plaintiffs or defendants, and the objection appears on the pleadings, it may be taken advantage of either by demurrer or by motion in arrest of judgment, or by error.

If the objection does not appear on the pleadings, and the action proceeds to trial with the wrong parties as plaintiffs or defendants, upon an issue traversing the contract, there would appear a variance between the contract made in fact and that alleged in the declaration which, unless amended, would be a ground of nonsuit or adverse verdict (*Chanter* v. *Leese*, 4 M. & W. 295); except in the case of the omission of a defendant jointly liable with the defendant sued, in which case proof of a joint contract is sufficient to sustain the allegation that the party sued contracted (*Whelpdale's Case*, 5 Co. Rep. 119 *a*; *Richards* v. *Heather*, 1 B. & Ald. 35); and except also in the case of the addition of a plaintiff who ought not to be joined. (See C. L. P. Act, 1860, s. 19, *infra*.) The sect. 222 of the C. L. P. Act, 1852, giving general powers to amend all defects and errors in any proceeding in civil causes does not apply in cases of misjoinder or non-joinder of parties. (*Wickens* v. *Steel*, 26 L. J. C. P. 241; 2 C. B. N. S. 488; *Robson* v. *Doyle*, 3 E. & B. 396.) And where a husband is sued alone, it gives no power to amend by adding the wife as a defendant. (*Garrard* v. *Ginbelei*, 31 L. J. C. P. 131.) But there are now certain means provided for amending the proceedings before trial, and even at the trial, which may be conveniently considered in the following order:—

Misjoinder of a plaintiff.]—If a plaintiff be joined who has no right as co-plaintiff, it is provided by the C. L. P. Act, 1852, s. 34, that the court

defendant jointly with *G. H.*, who is still living, and who at the commencement of this suit was, and still is, resident within the jurisdiction of this court, and not by the defendant alone. [*Conclude as ante, p.* 387.]

Plea by a defendant sued as the assignee of a lease, that the lease

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or a judge may at any time *before trial* order that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from the cause, if it shall appear that injustice will not be done by such amendment, and that the person or persons to be struck out were originally introduced without his or their consent, or that such person or persons consent either in person or by writing under his or their hands to be so struck out. And by s. 35, a similar amendment may be made *at the trial*.

By the C. L. P. Act, 1860, s. 19, "The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them; or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover; provided always that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge." This section applies where the legal right may be supposed to exist in all the persons joined as plaintiffs, and it is found at the trial to exist in one or more of them only; but it does not apply where it cannot exist in all the plaintiffs jointly, and the doubt is whether it exists in one or others of them exclusively. Thus, an administrator suing as such cannot be joined with a plaintiff suing in his own right, because the cause of action could not be vested in an administrator as such, jointly with another in his own right. (*Bellingham* v. *Clark*, 1 E. B. & S. 332.)

Non-joinder of a plaintiff.]—If a necessary co-plaintiff is omitted without whom the others cannot sue, by the C. L. P. Act, 1852, s. 34, the court or a judge may, *before the trial*, order that any person or persons not joined as plaintiff or plaintiffs shall be so joined, if the person or persons to be so added consent either in person or by writing under his or their hands to be so joined; and the liability of any person or persons so added as co-plaintiff or co-plaintiffs shall be the same as if they had been originally joined in the cause. And by s. 35, if it shall appear *at the trial* that some person or persons not joined as plaintiff or plaintiffs ought to have been so joined, and the defendant shall not at or before the time of pleading have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, such non-joinder may be amended as a variance *at the trial*, in like manner as *before the trial*, by s. 34. The defendant may also meet the non-joinder of a necessary co-plaintiff by a plea in abatement (1 Chit. Pl. 7th ed. 15); but, as the non-joinder would produce a variance at the trial and be a ground of nonsuit, the objection is never taken in this form. It is provided by s. 36, that upon a plea in abatement being pleaded, or upon such notice being given as is prescribed by s. 35, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea by adding the name or names of the person or persons named in the notice or plea in abatement, and to proceed in the action without any further appearance, and in such case the defendant shall be at liberty to plead *de novo*. And by r. 6, H. T. 1853, upon such amendment the plaintiff must file a consent in writing of the party whose name is added, unless dispensed with by order.

Misjoinder of a defendant.]—In the case of the joinder of too many defendants, the court or a judge may by the C. L. P. Act, 1852, s. 37, at any

vested by assignment in the defendant jointly with another: Heap v. *Livingston*, 11 M. & W. 896.

Plea that a bill of exchange was accepted by the defendant jointly with another: Bleakley v. *Jay*, 13 M. & W. 464.

Plea of the non-joinder of a joint debtor to part of the declaration only: Powell v. *Fullerton*, 2 B. & P. 420.

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time *before the trial* order that the name or names of one or more of such defendants be struck out, if it shall appear that injustice will not be done by such amendment; and in case it shall appear *at the trial* that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial in like manner as the misjoinder of plaintiffs. (*Supra; Robson* v. *Doyle*, 3 E. & B. 396.) Under this section the court will amend by striking out the name of a defendant who has already suffered judgment by default (*Greaves* v. *Humphreys*, 24 L. J. Q. B. 150; 4 E. & B. 851), or the name of a defendant where a co-defendant has suffered judgment by default. (*Johnson* v. *Goslett*, 25 L. J. C. P. 274; 18 C. B. 728.) But the application to strike out the name of the defendant must be made before verdict. (*Robson* v. *Doyle*, 3 E. & B. 396.) No amendment can be made after the jury have decided the question of liability by verdict. (*Wickens* v. *Steel*, 26 L. J. C. P. 241; 2 C. B. N. S. 488.) The court has no power to review the decision of a judge at the trial in refusing an amendment under this or under the 35th section. (*Holden* v. *Ballantine*, 29 L. J. Q. B. 148.)

Non-joinder of a defendant.]—If a defendant is omitted who is jointly liable with those sued, and the objection is not taken by plea in abatement, proof at the trial of a joint contract would sustain an allegation that the defendant or defendants contracted, and would be no variance. (1 Wms. Saund. 291 *b*; *Whelpdale's Case*, 5 Co. Rep. 119 *a*; *Richards* v. *Heather*, 1 B. & Ald. 35; *Cross* v. *Williams*, 31 L. J. Ex. 145.) If such plea be pleaded, the plaintiff may enter a *cassetur breve* and commence another action against the original defendant jointly with those named in the plea, or may amend the writ and declaration under the C. L. P. Act, 1852, s. 38, which provides that where the non-joinder of any person as a co-defendant has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration by adding the name of the person named in such plea in abatement as joint contractor, and to serve the amended writ upon the person so named in such plea in abatement, and to proceed against the original defendant and the person so named in such plea. And by s. 39, the original defendant is made ultimately liable for the costs of the plea in abatement and of the amendment, and also for the costs in the cause, in respect of such of the persons named in the plea as appear at the trial not to be jointly liable; but in respect of those who are liable, the plaintiff pays the costs of the plea in abatement and of the amendment. (*Cazneau* v. *Morrice*, 25 L. J. Q. B. 126.) A similar provision as to costs is contained in the 3 & 4 Will. IV. c. 42, s. 10, to meet the case where after such plea in abatement the plaintiff shall commence another action against the original defendants jointly with those named in the plea in abatement.

By the statute 3 & 4 Will. IV. c. 42, s. 8, it has been provided "that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea." So that a plea in abatement cannot be pleaded in respect of a co-defendant resident out of the jurisdiction. (*Joll* v. *Lord Curzon*, 4 C. B. 249.) This plea in abatement must state all the co-defendants who ought to be joined, otherwise the plaintiff

Affidavit of the Truth of a Plea in Abatement (*a*).

In the ——.

Between *A. B.*, plaintiff, and *E. F.*, defendant.

I, *E. F.*, of ——, the above-named defendant in this cause, make oath and say, that the plea hereunto annexed is true in substance and fact [*if the plea is one of non-joinder of a co-defendant add:* and that *G. H.*, in the said plea named, resides at No. ——, in —— street, in the parish of ——, in the county of ——].

Sworn, etc.

Plea of the Non-joinder of a Co-executor as a Plaintiff (*b*).

(*Commence with the form, ante, p.* 387.) That the said *G. H.* made his last will in writing, and thereby appointed the plaintiff and *J. K.* executors thereof, and after his death and before action the plaintiff duly proved the said will, and the said *J. K.* is still living. [*Conclude as ante, p.* 387.]

Plea of the Non-joinder of a Co-executor as a Defendant (*c*).

(*Commence with the form, ante, p.* 387.) That the said *G. H.*

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has not a better writ. (*Godson* v. *Good*, 6 Taunt. 587; *Crellin* v. *Calvert*, 14 M. & W. 11.) It must be confined to the count or part of the claim in respect of which the liability is joint. (*Hill* v. *White*, 6 Bing. N. C. 26.)

Parties to actions on contract.]—Where a contract is made with several persons jointly and not severally, they must join as co-plaintiffs in suing upon it. (*Eccleston* v. *Clipsham*, 1 Wms. Saund. 153.) And where several persons contract jointly and not severally, they must be joined as co-defendants (although in the latter case the non-joinder would only be ground for a plea in abatement); when the contract on either side is joint and several, an action or actions may be brought by or against the parties jointly or severally. (*Ib.*; *Abbot* v. *Smith*, 2 W. Bl. 949.)

Where there are several persons parties to the same contract on either side, it is often difficult to determine whether the contract is *joint* or *several*. The construction of the contract in this respect depends primarily on the language used, but is a question of intention to be determined by considering, not only the language, but also the interests and relations of the parties. A contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if the words are unmistakably joint, then, although the interest be several, all the parties must be joined in the action; if the words are unmistakably several, the action must be several, though the interest be joint. (*Sorsbie* v. *Park*, 12 M. & W. 154; *Keightley* v. *Watson*, 3 Ex. 721; *Pugh* v. *Stringfield*, 27 L. J. C. P. 34; 3 C. B. N. S. 2; *Beer* v. *Beer*, 12 C. B. 60; *Foley* v. *Addenbrooke*, 4 Q. B. 197; *Haddon* v. *Ayers*, 28 L. J. Q. B. 105.)

(*a*) This affidavit is required by 4 Anne, c. 16, s. 11; and in case of non-joinder of a co-defendant by 3 & 4 Will. IV. c. 42, s. 8; and see Chit. Forms, 9th ed. 457. It may be made by a third person.

(*b*) In actions by executors they ought all to join, though some be infants, or have not proved the will; but if one sue alone, the defendant can take advantage of it only by plea in abatement. (1 Wms. Saund. 291 *k*, *l*; 2 Chit. Pr. 11th ed. 1213; 2 Wms. Exs. 5th ed. 1692.)

(*c*) This plea must state, as above, that the executor not joined has adminis-

made his last will in writing, and thereby appointed the defendant and *J. K.* executors thereof, and after his death and before action the said *J. K.* and the defendant duly proved the said will, and took upon themselves the execution thereof, and administered divers goods which were of the said *G. H.* at the time of his death; and the said *J. K.* is still living, and at the commencement of this suit was and still is resident within the jurisdiction of this court. [*Conclude as ante, p.* 387.]

A like plea: Ryalls v. *Bramall*, 1 Ex. 734.

Plea of the Coverture of the Plaintiff (*a*).

(*Commence with the form, ante, p.* 387.) That the plaintiff at the commencement of this suit was and still is the wife of *G. H.*, who is still living. [*Conclude as ante, p.* 387.]

A like plea: De Wahl v. *Braune*, 25 L. J. Ex. 343; 1 H. & N. 178.

Plea of the Coverture of the Defendant (*b*).

(*Commence with the form, ante, p.* 387, *the defendant pleading* in

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tered, as it is only necessary to sue so many of the executors as have administered. (1 Wms. Saund. 291 *m*; 2 Wms. Exs. 5th ed. 1750.) The objection here pleaded is only matter for plea in abatement; so also that defendant is administrator and not executor, or conversely; or that defendant, sued as administrator generally, is administrator only during the minority of an executor. (See 2 Wms. Ex. 5th ed. 1758.)

(*a*) As to when this plea is necessary, see *ante*, "*Husband and Wife*," p. 146. The coverture of the plaintiff when entitled to be joined with her husband must be pleaded in abatement. (*Bendix* v. *Wakeman*, 12 M. & W. 97; *Guyard* v. *Sutton*, 3 C. B. 153.) A replication that the plaintiff's husband was an alien enemy was held bad on demurrer. (*De Wahl* v. *Braune*, 25 L. J. Ex. 343; 1 H. & N. 178.)

As to the position of a married woman who has obtained a judicial separation, or an order for the protection of her property under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, see ss. 21, 25, 26, *ante*, p. 148.

By the C. L. P. Act, 1852, s. 141, "The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may notwithstanding be proceeded with to judgment, and such judgment may be executed against the wife alone, or by suggestion or writ of revivor pursuant to this Act judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court."

Before this enactment it was necessary to plead the marriage pending the action in abatement as a plea to the further maintenance or *puis darrein continuance*, as the case might be. (*Morgan* v. *Painter*, 6 T. R. 265; *Walker* v. *Golling*, 11 M. & W. 78.)

(*b*) The coverture of the defendant when sued on a contract made before marriage, can be pleaded only in abatement. (*Milner* v. *Milnes*, 3 T.

person, *not* by attorney, *see ante*, p. 4.) That at the commencement of this suit she was and still is the wife of *G. H.*, who is still living. [*Conclude as ante, p.* 387.]

Plea of another Action pending for the same Cause of Action (*a*).

(*Commence with the form, ante, p.* 387.) That before this suit the plaintiff issued a writ of summons out of the Court of Queen's Bench at Westminster against the defendant, in an action for the same causes of action as in the declaration herein mentioned, as by the record and proceedings thereof remaining in the said court appears, and the parties in this and the said former suit are the same parties, and the said former suit is still depending in the said court. [*Conclude as ante, p.* 387.]

R. 631; *Lovell* v. *Walker*, 9 M. & W. 299.) But where a married woman is sued upon a contract made during marriage, her coverture is a defence in bar. (See *post*, "*Husband and Wife.*")

As to the effect of the marriage of the defendant pending the action, see the preceding note.

The plea in abatement of coverture is not within the 3 & 4 Will. IV. c. 42, s. 8, and therefore does not require an affidavit of the residence of the husband (*Jones* v. *Smith*, 3 M. & W. 526); but it is a dilatory plea, requiring an affidavit of verification under the statute 4 Anne c. 16, s. 11, *ante*, p. 407 (*a*).

(*a*) The pendency of another action for the same cause may be pleaded in abatement, not in bar. (Per Bayley, J., *Harley* v. *Greenwood*, 5 B. & Ald. 95, 101; and see *Williamson* v. *Bissill*, 31 L. J. Ex. 131.) The pendency of an action in an inferior court (*Laughton* v. *Taylor*, 6 M. & W. 695), or in a foreign court (*Cox* v. *Mitchell*, 29 L. J. C. P. 33), cannot be so pleaded.

The pendency of an action against the defendant jointly with another for the same demand may be pleaded in abatement (*Earl of Bedford* v. *Bishop of Exeter*, Hob. 137); and conversely, an action against one defendant solely may be pleaded in abatement of an action against the defendant sued jointly with another for the same cause (*Ib.*; *Rawlinson* v. *Oriet*, 1 Show. 73); where, however, it is suggested that the plea can only be pleaded severally by the one defendant who is sued in the first action. The pendency of an action for the same demand against a person jointly liable with the defendant cannot be pleaded in abatement (*Henry* v. *Goldney*, 15 M. & W. 494); but where two separate actions were brought against two joint contractors in respect of the same demand, on payment of the debt and costs in one action, the court made an order to stay proceedings in the other without costs. (*Newton* v. *Blunt*, 3 C. B. 675.) Judgment recovered in an action against one joint contractor may be pleaded in bar to an action brought against another co-contractor. (*King* v. *Hoare*, 13 M. & W. 494; and see *post*, "*Judgment.*")

The pendency of an action by a bankrupt brought before bankruptcy cannot be pleaded in abatement of an action by the assignees for the same cause. (*Biggs* v. *Cox*, 4 B. & C. 920.) As to the assignees continuing the former action, see the C. L. P. Act, 1852, s. 142; *post*, "*Bankruptcy*," p. 439.)

If the defendant has obtained judgment of *non pros.* against the plaintiff in the former action, he cannot afterwards plead its pendency in abatement. (*Pepper* v. *Whalley*, 3 Dowl. 579.)

Like pleas: Laughton v. *Taylor*, 6 M. & W. 695; *Henry* v. *Goldney*, 15 M. & W. 494; *Boyce* v. *Webb*, 15 Q. B. 84.

Plea by an Attorney of the Privilege of being sued only in the Court of which he is an Attorney (a).

That at the commencement of this suit the defendant was and still is one of the attorneys of the Court of ——, at Westminster, and during all that time prosecuted and defended suits and pleas in that court for divers subjects of the Queen, as their attorney; and that the defendant and all other the attorneys of the said court, ought by an ancient custom of the said court, from time immemorial used, to be free from being compelled, and have not at any time been used to be compelled to answer any plea in any action personal (pleas of freehold, felony, and appeals only excepted) before any justice or minister of the Queen, or any judge in any court, except before the justices [*or* barons] of the said Court of ——. And this the defendant is ready to verify; wherefore he prays judgment if the court here will or ought to take cognizance of the said plea.

Like pleas: Graham v. *Ingleby*, 2 Ex. 442; *South Staffordshire Ry. Co.* v. *Smith*, 5 Ex. 472.

Plea that the Plaintiff is an alien Enemy (b).

(*Commence with the form, ante, p.* 387.) That at the commencement of this suit the plaintiff was and is an alien born (that is to say), born in the [empire of ——], *of* alien father and alien mother, and was not nor is a subject of the Queen by naturalization, denization, or otherwise, and was and is an enemy of the Queen, and residing in this kingdom without the licence, safe-conduct, or permission of the Queen. [*Conclude as ante, p.* 387.)

(*a*) This is not strictly a plea in abatement but a plea of privilege (see *Hunter* v. *Neck*, 3 M. & G. 181, 188.) An attorney being a sole defendant, and sued in his own right, has the privilege of being sued in the court of which he is an attorney, and in no other. (*South Staffordshire Ry. Co.* v. *Smith*, 5 Ex. 472; *Yeardley* v. *Roe*, 3 T. R. 573.) If sued in any other court he may plead his privilege in abatement (*Davidson* v. *Chilman*, 1 Bing. N. C. 297; 1 Chit. Pr. 11th ed. 77; 2 *ib.* 901; *ante*, "*Attorney*," p. 66); but by 12 & 13 Vict. c. 101, s. 18, it is enacted, "that no privilege shall be allowed to any attorney or other person to exempt him from the provisions of the County Court Acts." The statute 1 Vict. c. 56, s. 4, which enables an attorney admitted in one court to practise in any other, does not *per se* take away his privilege. (*Prior* v. *Smith*, 6 Dowl. 299.) An attorney of two courts may be sued in either. (*Walford* v. *Fleetwood*, 14 M. & W. 449.) The plea may be pleaded in person or by attorney (*Chatland* v. *Thornley*, 12 East, 544; *Hunter* v. *Neck*, 3 M. & G. 181); but the latter seems the more proper form. (*Groom* v. *Wortham*, 2 Dowl. N. S. 657.)

(*b*) If the plaintiff was an alien enemy when the contract was made, this defence may be pleaded in bar. If he has become so since action brought it can only be pleaded in abatement (see *Harman* v. *Kingston*, 3 Camp. 150, 153); and it must then be pleaded either to the further maintenance or, if he has already pleaded, *puis darrein continuance*, and this cannot be done if the defendant was under terms to plead issuably. (*Shepeler* v. *Durant*, 14 C. B. 582.)

Like pleas: Casseres v. *Bell*, 8 T. R. 166; *Alcinous* v. *Nigreu*, 4 E. & B. 217.

Plea to the further maintenance of the action that the plaintiff became an alien enemy after its commencement: see Le Bret v. *Papillon*, 4 East, 502.

Replication to a Plea of Non-joinder that the Defendant is solely liable (a).

(*Commence with the form, ante, p.* 392.) That the said promise was not made [*or* the said debt was not contracted] by the defendant jointly with the said *G. H.* as alleged. [*Conclude as ante, p.* 392.]

Replication to a Plea of Non-joinder denying that the Party not sued is resident within the Jurisdiction.

(*Commence with the form, ante, p.* 392.) That the said *G. H.* was not at the commencement of this suit resident within the jurisdiction of this court, as alleged. [*Conclude as ante, p.* 392.]

Replication to a Plea of Non-joinder that the Co-contractor was discharged by Bankruptcy and Certificate (b).

(*Commence with the form, ante, p.* 392.) That after the accruing of

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(*a*) The plaintiff may either demur or reply to a plea in abatement. (2 Chit. Pr. 11th ed. 903.) If the plaintiff cannot do either successfully, he may enter a *cassetur breve*, and commence a fresh action; or if the plea be one of non-joinder, he may amend his writ and declaration as provided by the C. L. P. Act, 1852, ss. 36, 38, *ante*, pp. 405, 406.

If the plaintiff denies the plea, it would be sufficient to take issue upon it, if the provisions of the C. L. P. Act, 1852, as to pleadings, are applicable to pleas in abatement. (But see *ante*, p. 387, n. (*a*).)

If issue in fact be joined after a plea in abatement, the judgment for the plaintiff upon verdict is final, *quod recuperet*. Upon demurrer, the judgment for the plaintiff is interlocutory only, *respondeat ouster*. Judgment for the defendant in both cases is that the writ be quashed. (See the practice fully stated, 2 Chit. Pr. 11th ed. 904.)

The plea of the non-joinder of a co-defendant cannot be sustained where the alleged joint-contractor has been discharged from the debt under bankruptcy or insolvency (see *infra*, n. (*b*)), or where he was an infant at the time of contracting, and has since avoided the contract, (see *post*, p. 412 (*a*)), or where the debt as against him is barred by the Statute of Limitations. In the latter case the replication above given is sufficient, by virtue of the statute 9 Geo. IV. c. 14 (Lord Tenterden's Act), s. 2, which enacts, "That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the recited Acts or this Act, or either of them" (that is, by reason of the want of an acknowledgment in writing, or now by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 14, part-payment, see "*Limitation*," *post*), "be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

(*b*) By 3 & 4 Will. IV. c. 42, s. 9, "To any plea in abatement in any

the causes of action in the declaration mentioned and before action, the said *G. H.* became bankrupt within the meaning of the statutes then in force concerning bankrupts, and was discharged from the said causes of action by bankruptcy and certificate. [*Conclude as ante, p.* 392.]

Replication to a Plea of Non-joinder that the Co-contractor was discharged under the Insolvent Act (*see ante,* p. 392 *n.*).

(*Commence with the form, ante, p.* 392.) That after the accruing of the causes of action in the declaration mentioned and before action, the said *G. H.* was duly discharged from the said causes of action by an order of adjudication made by the Court for the Relief of Insolvent Debtors in England under the statutes then in force in that behalf, which said order still remains in force. [*Conclude as ante, p.* 392.]

Replication to Plea of Non-joinder that the Party not joined was an infant: Gibbs v. *Merrill,* 3 Taunt. 307; *Burgess* v. *Merrill,* 4 Taunt. 468 (*a*).

Replication to a Plea of Coverture of the Defendant denying it.

(*Commence with the form, ante, p.* 392.) That she was not the wife of the said *G. H.* as alleged. [*Conclude as ante, p.* 392.]

Accord and Satisfaction (*b*).

court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an Act for the relief of insolvent debtors." This enactment renders it unnecessary to join a bankrupt or insolvent co-contractor as a defendant; but if a plea in abatement is pleaded, the bankruptcy or insolvency must be replied. (See *Bovill* v. *Wood,* 2 M. & S. 23.)

(*a*) It would seem that the fact of the alleged co-contractor being an infant and having repudiated the contract, might be shown under a traverse of the plea. If a special replication is adopted, it must allege both the infancy and the repudiation. (See per Patteson, J., *Boyle* v. *Webster,* 17 Q. B. 950, 956.) Upon an issue joined by the plaintiff on a plea in abatement of the non-joinder of a co-contractor, where it appeared upon the trial that the co-contractor was an infant and had not avoided the contract, the defendant was held entitled to succeed. (*Gibbs* v. *Merrill,* 3 Taunt. 307.) A replication to such a plea, of the infancy of the co-contractor, was held good on demurrer. (*Burgess* v. *Merrill,* 4 Taunt. 468.) Where in an action against two defendants upon a contract one pleaded his infancy, it was held that the plaintiff could not enter a *nolle prosequi* to the plea of infancy and continue the action against the other defendant, because by the *nolle prosequi* he admitted that there never was any joint binding contract. (*Boyle* v. *Webster,* 17 Q. B. 950; and see *Chandler* v. *Parkes,* 3 Esp. 76.) In such case he ought to discontinue the action and commence a fresh one against the defendant solely liable.

(*b*) *Accord and satisfaction.*]—This defence consists, as the name imports, of two parts, *accord* and *satisfaction;* that is to say, of something

given or done by the defendant to or for the plaintiff, and accepted by the latter upon a mutual agreement that it shall be a discharge of the cause of action. The agreement is the accord, and the thing given or done is the satisfaction. Both parts are essential to the defence, for accord without satisfaction, or satisfaction without accord, is no answer. It must be pleaded specially, r. 8, T. T. 1853, *ante*, p. 401.

Anything may be given and received by way of accord and satisfaction; and in the common case of a debtor paying his creditor a debt *post diem*, the defence is really one of accord and satisfaction, although from the frequent recurrence of the transaction it is looked upon as a distinct defence under the name of payment. (See *post*, "*Payment.*") In the case of payment of an ascertained debt, however, a smaller sum is no satisfaction of a larger without some additional consideration; whereas in other cases the value of the things done or given in accord and satisfaction is not inquired into, as they are accepted as equivalent by agreement. (*Pinnel's case*, 5 Rep. 117 *a*; per Parke, B., *Curlewis* v. *Clarke*, 3 Ex. 375, 379; *Down* v. *Hatcher*, 10 A. & E. 121; *Sibree* v. *Tripp*, 15 M. & W. 23; *Cumber* v. *Wane*, 1 Smith's L. C. 5th ed. 288); but payment of a smaller sum may be a satisfaction of a larger ascertained debt where there is a valid agreement to that effect, as where it is agreed to be paid before the whole debt is due, or where it is paid as a composition for the debt under an arrangement with creditors, or where it is paid by a third party. (*Lewis* v. *Jones*, 4 B. & C. 506, 513; *Welby* v. *Drake*, 1 C. & P. 557; *Wilkinson* v. *Byers*, 1 A. & E. 106.) An account stated of the balance due between the plaintiff and the defendant and a payment of that balance by the defendant, being a smaller sum than the amount claimed, where all the items of the account are on one side, is not a good plea in accord and satisfaction, but only an informal plea of payment *pro tanto*. (*Perry* v. *Attwood*, 25 L. J. Q. B. 408. A similar plea was held bad in *Smith* v. *Page*, 15 M. & W. 683.) A plea of an account stated of cross demands and payment of the balance is good. (*Callander* v. *Howard*, 10 C. B. 290; *Sutton* v. *Page*, 3 C. B. 204.) A statement of account in which all the items are on one side, does not affect the rights of the parties. (*Smith* v. *Forty*, 4 C. & P. 126; *Jones* v. *Ryder*, 4 M. & W. 32; and see *ante*, p. 44, n. (*a*).)

A substituted agreement may be accepted in accord and satisfaction of an existing cause of action, the new promise only and not the performance of it being taken in satisfaction and discharge. (*Hall* v. *Flockton*, 14 Q. B. 380; 15 Ib. 1039; *Evans* v. *Powis*, 1 Ex. 601.)

The accord must be executed and satisfied. If the defendant has not performed it on his part, or if the plaintiff has not accepted the performance in satisfaction, the accord alone is no defence. (*Bayley* v. *Homan*, 3 Bing. N. C. 920.) Thus, a plea that it was agreed that the defendant should secure the debt by a mortgage to be paid by instalments, and that the defendant had always been ready to execute the mortgage, but had never been called upon to do so, was held bad. (*Allies* v. *Probyn*, 2 C. M. & R. 408.) So, a plea that it was agreed that the plaintiff should take out his debt in beer, and that the defendant was always ready and willing to carry out the agreement on his part, was held a bad plea. (*Collingbourne* v. *Mantell*, 5 M. & W. 289; and see *Wray* v. *Milestone*, 5 M. & W. 21.) So in an action upon a contract to deliver timber, the plea that the plaintiff agreed to accept other timber instead of that contracted for, and that the defendant tendered such other timber, which the plaintiff refused to accept, was held to be an accord without satisfaction. (*Gabriel* v. *Dresser*, 24 L. J. C. P. 81.) So, pleas to the effect that it was agreed that the defendant should give the plaintiff authority to collect the defendant's debts, and satisfy the cause of action thereout, and that the plaintiff might have collected the debts, but through his negligence or default failed in doing so, have been held to be bad pleas. (*Gifford* v. *Whittaker*, 6 Q. B. 249; *Baillie* v. *Moore*, 8 Q. B. 489.) Until satisfaction under the accord, the original cause of action is

Plea of Accord and Satisfaction by Work done, Goods sold, etc. (*a*)

That he satisfied and discharged the plaintiff's claim by doing work and providing materials for the same for the plaintiff, and by delivering goods to the plaintiff, which work and materials and goods were so done and provided and delivered by the defendant, and were accepted by the plaintiff respectively in satisfaction and discharge of the said claim.

Plea of Accord and Satisfaction, another Form (*a*).

That he delivered to the plaintiff, and the plaintiff accepted and received from the defendant, certain goods [*or, as the case may be*] in satisfaction and discharge of the plaintiff's claim.

Plea of accord and satisfaction after action brought: Corbett v. *Swinburne*, 8 A. & E. 673.

Plea of accord and satisfaction made to one of three joint plaintiffs: Wallace v. *Kelsall*, 7 M. & W. 264.

Pleas of accord and satisfaction: by delivery of goods: Hall v. *Poyser*, 13 M. & W. 600; *by a set-off of debts and delivery of goods: Wallace* v. *Kelsall*, 7 M. & W. 264; *by giving a guarantee: Alexander* v. *Strong*, 9 M. & W. 734; *by an account stated respecting mutual debts: Learmonth* v. *Grandine*, 4 M. & W. 658; *by delivering goods to a third party for the plaintiff: Stead* v. *Poyer*, 1 C. B. 782; *by an agreement to refer certain matters to arbitration and performance of the agreement: Williams* v. *London Commercial*

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not at all affected thereby, so that it remains liable to be barred by the Statute of Limitations. (*Reeves* v. *Hearne*, 1 M. & W. 323.)

An accord and satisfaction made by a third party with the plaintiff, on the defendant's behalf, may be subsequently adopted by him and enure to his benefit. (*Jones* v. *Broadhurst*, 9 C. B. 193, and the cases there cited; *Randall* v. *Moon*, 12 C. B. 261.) An accord and satisfaction made with one of several joint plaintiffs is a good discharge as against all, and may be pleaded according to the fact or the legal effect. (*Wallace* v. *Kelsall*, 7 M. & W. 264; *Smith* v. *Lovell*, 10 C. B. 6, 23.) So, an accord and satisfaction accepted from one of several joint debtors is a discharge of all. (*Nicholson* v. *Revill*, 4 A. & E. 675.)

Accord and satisfaction after breach is in general a good defence to an action on any contract, whether made by parol or by specialty. (*Blake's case*, 6 Co. 43 *b*. But see in cases of bonds and covenants for payment of present money debts, *Peytoe's case*, 9 Co. 79 *a*; *Massey* v. *Johnson*, 1 Ex. 241, 253; *Cumber* v. *Wane*, 1 Smith, L. C. 5th ed. 288, 295.) By accord and satisfaction the cause of action is entirely discharged, and no further claim can arise upon it, even in respect of damages which have accrued subsequently, and were not foreseen at the time of the satisfaction. (*Nicklin* v. *Williams*, 10 Ex. 259.)

(*a*) The accord may be stated briefly and inferentially, as in the above precedents, or it may be stated fully, with a distinct allegation of satisfaction by performance of it. In the latter case it forms a separate allegation in the plea, and may be traversed separately. (*Bainbridge* v. *Lax*, 9 Q. B. 819.) The former is the safest mode of pleading, because where the accord is pleaded separately, the precise execution of it must be pleaded; and if it fails in any part, the plea is bad. (See *Peytoe's Case*, 9 Co. Rep. 80 *b*.)

Exchange Co., 10 Ex. 569; *by the settlement of a former action for the same cause on payment of the debt and costs: Power* v. *Butcher*, 10 B & C. 329; *Ross* v. *Jaques*, 8 M. & W. 135; *by paying a smaller sum and withdrawing a defence to an action and paying costs: Cooper* v. *Parker*, 14 C. B. 118; 15 C. B. 822; *by the plaintiff satisfying the debt out of goods deposited in his hands for that purpose: Ross* v. *Moses*, 1 C. B. 227; *by delivering possession of a house and a payment of money: Lavery* v. *Turley*, 30 L. J. Ex. 49; 6 H. & N. 239; *by a composition made by the defendant with his creditors, see post,* "*Composition*," p. 482.

Pleas of accord and satisfaction: to an action on a bill of exchange, by delivery of other negotiable instruments: James v. *Williams*, 13 M. & W. 828; *to an action for the breach of the condition of a bond: Field* v. *Robins*, 8 A. & E. 90; *to an action for not delivering goods under a contract of sale, by the acceptance of other goods in accord and satisfaction: Gabriel* v. *Dresser*, 15 C. B. 622; *to an action for use and occupation that plaintiff had wrongfully distrained the defendant's goods, and it was agreed that plaintiff should keep the goods distrained in satisfaction of the debt: Jones* v. *Sawkins*, 5 C. B. 142; *to an action on an award to pay money by instalments: Smith* v. *Trowsdale*, 3 E. & B. 83.

Plea of Accord and Satisfaction by giving a Bond.

That he satisfied and discharged the plaintiff's claim by delivering to the plaintiff the bond of the defendant, in the penal sum of £——, conditioned for the payment to the plaintiff of £——, and interest for the same, which bond the defendant so delivered, and the plaintiff accepted respectively in satisfaction and discharge of the said claim.

Pleas of accord and satisfaction: by the grant of an annuity: Turner v. *Browne*, 3 C. B. 157; *by giving a warrant of attorney: Fearn* v. *Cochrane*, 4 C. B. 274.

Plea to an action for debts incurred in respect of a ship, that plaintiff took a bottomry bond in accord and satisfaction: Weston v. *Foster*, 2 Bing. N. C. 693.

Plea of Accord and Satisfaction by giving a Bill of Exchange (*a*).

That he satisfied and discharged the plaintiff's claim by indorsing and delivering to the plaintiff a bill of exchange dated the —— day

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(*a*) A negotiable bill or note may be given and accepted in complete satisfaction and discharge of a cause of action, and the transaction then amounts to an accord and satisfaction, and is pleaded as above; or it may be given and accepted merely for and on account of the cause of action, and then it amounts only to a conditional payment, which suspends the right of action during the running of the security and until default in payment; and before payment the defence must be specially pleaded according to the facts. (See "*Bill taken for the Debt*," *post*, p. 463.)

Where a bill or note is taken in accord and satisfaction and the defence is so pleaded, a replication that it was afterwards dishonoured is bad. (*Sard* v. *Rhodes*, 1 M. & W. 153.)

Where the bill or note is taken for and on account of a debt, if the instrument (or any renewal of it) is duly paid, it operates as payment of the debt,

of ——, A.D. ——. drawn by the defendant on [and accepted by] *J. K.*, whereby the defendant required the said *J. K.* to pay to the defendant or order £——, —— months after date, which said bill the defendant so indorsed and delivered to the plaintiff, and the plaintiff accepted and received in satisfaction and discharge of the plaintiff's claim.

Plea of Accord and Satisfaction by making and delivering to the Plaintiff a Promissory Note.

That he satisfied and discharged the plaintiff's claim by indorsing and delivering to the plaintiff a promissory note dated the —— day of ——, A.D. ——, made by *J. K.*, whereby the said *J. K.* promised to pay to the defendant or order £——, —— months after date ——, which said note the defendant so indorsed and delivered to the plaintiff, and the plaintiff accepted and received in satisfaction and discharge of the plaintiff's claim.

Plea of Accord and Satisfaction by Payment of a smaller Sum by a Third Party. (*See ante*, p. 413.)

That the plaintiff's claim was satisfied and discharged by *J. K.* paying to the plaintiff, at the defendant's request, out of the proper moneys of the said *J. K.* a sum of money which, by agreement between him and the plaintiff and the defendant, the said *J. K.* so paid, and the plaintiff accepted and received in satisfaction and discharge of the said claim.

Plea to an action by the indorsee of a bill against the acceptor, that the plaintiff took the promissory note of the drawer in satisfaction and discharge of the bill: Sard v. *Rhodes*, 1 M. & W. 153.

Plea of an Agreement between the Plaintiff, the Defendant, and a third party, that the Defendant should be discharged and the third party be accepted by the Plaintiff as his Debtor instead, and acceptance accordingly (*a*).

That after the plaintiff's claim became due, *J. K.* was indebted to

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and the defence may be proved under the common plea of payment (see *post*, "*Payment*"); if the bill or note is dishonoured, the original right of action revives. A bill or note for a smaller sum cannot be effectually given *for and on account* of a larger sum due, and a plea to that effect would be bad (*Thomas* v. *Heathorne*, 2 B. & C. 477); but such an instrument, if negotiable, may be given and accepted in satisfaction and discharge of a larger sum. (*Sibree* v. *Tripp*, 15 M. & W. 23; and see *Cumber* v. *Wane*, 1 Smith L. C. 5th ed. 288.)

Whether the bill or note is given and accepted *in accord and satisfaction* or *for and on account* of the debt, is a question of fact depending on the actual agreement made between the parties. (*Sibree* v. *Tripp*, 15 M. & W. 23; *Goldshede* v. *Cottrell*, 2 M. & W. 20; *and see Maillard* v. *Duke of Argyle*, 6 M. & G. 40.)

(*a*) Where an agreement has been made between the plaintiff and the defendant and a third party, that the latter should become liable to the plaintiff instead of the defendant, and that the defendant should be discharged,

the defendant in £——, and it was then agreed by and between the plaintiff and the defendant and the said *J. K.* that the defendant should relinquish his said claim against the said *J. K.* for the last-mentioned sum, and the said *J. K.* should pay the same to the plaintiff instead of to the defendant, and that the plaintiff should accept the said *J. K.* as his debtor in lieu of the defendant, in respect of the last-mentioned sum and in satisfaction and discharge of the plaintiff's claim in the declaration mentioned; and in pursuance of the said agreement the defendant then relinquished his said claim against the said *J. K.*, and the plaintiff then accepted the said *J. K.* as his debtor, in lieu of the defendant, on the terms aforesaid, and in such satisfaction and discharge as aforesaid.

Plea that the defendant was partner in a firm of A. & Co., by whom the debt was contracted, that the defendant left the firm and another person was taken into the firm instead, and that the plaintiff accepted the new firm as his debtors and discharged the defendant: Hart v. *Alexander*, 2 M. & W. 484.

Plea by one of two defendants sued jointly that he incurred the debt as partner with the other, and retired from the partnership upon the terms of the creditor accepting the separate liability of the other partner in discharge of the joint liability: Lyth v. *Ault*, 7 Ex. 669; *and see Lodge* v. *Dicas*, 3 B. & Ald. 611; *Thomas* v. *Shillibeer*, 1 M. & W. 124.

Plea of an Agreement between the Plaintiff, the Defendant, and a third party, that the Defendant should be discharged in consideration of his being accepted instead of the Plaintiff as debtor to the third party, and acceptance by the third party accordingly.

That after the plaintiff's claim herein pleaded to became due the plaintiff was indebted to *J. K.* in £——, and it was then agreed by and between the plaintiff and the defendant and the said *J. K.* that the plaintiff should be credited in his account with the said *J. K.* with the sum of £——, and should be allowed the same by him in such account as if it had been paid to him by the plaintiff, and that the defendant should become and should be accepted by the said *J. K.* as his debtor for the amount of the said claim herein pleaded

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and the plaintiff has accepted the liability of the third party, and discharged the defendant according to the agreement, the transaction affords a good defence by way of accord and satisfaction. (See per Buller, J., *Tatlock* v. *Harris*, 3 T. R. 174, 180; *Hodgson* v. *Anderson*, 3 B. & C. 842, 855; *Cuxon* v. *Chadley*, 3 B. & C. 591; and see *ante*, p. 37.) The acceptance of the separate liability of one of several joint debtors instead of the joint liability of all is a sufficient consideration for the discharge of the joint liability, and may be pleaded in accord and satisfaction in an action brought upon it. (*Lyth* v. *Ault*, 7 Ex. 669; overruling *Lodge* v. *Dicas*, 3 B. & Ald. 611.)

So, where an agreement has been made between the plaintiff and the defendant and a third party, to whom the plaintiff was indebted, that the defendant should take upon himself the debt of the plaintiff, in consideration of the plaintiff discharging him from his debt, and the defendant has become liable to the third party accordingly, this may be pleaded as a valid plea in accord and satisfaction. (*Cockrane* v. *Greene*, 30 L. J. C. P. 97, 101.)

to instead of the plaintiff, and that the claim of the plaintiff against the defendant, in respect of the last-mentioned sum, and the said claim of the said *J. K.* against the plaintiff respectively should be thereby discharged and satisfied; and in pursuance of the said agreement the plaintiff was then credited in his account with the said *J. K.* with the said *S*——, and was allowed the same by him in such account as though it had been paid to him by the plaintiff, and the defendant then became and was accepted by the said *J. K.*, as his debtor for the amount of the said claim herein pleaded to instead of the plaintiff, on the terms aforesaid; and the plaintiff then accepted the said agreement and the performance thereof as aforesaid, in satisfaction and discharge of his claim herein pleaded to.

A like plea (held bad for not stating an agreement by the plaintiff to discharge the defendant): Cockrane v. *Green*, 30 L. J. C. P. 97.

Replication to Pleas of Accord and Satisfaction.

The *replication* may deny both the accord and the satisfaction, by taking issue on the plea; or where the accord and the satisfaction are stated separately in the plea, the replication may traverse either or both in terms: *Bainbridge* v. *Lax*, 9 Q. B. 819.

Account (*a*).

"*Plea that the defendant never was bailiff as alleged.*(*b*): *Wheeler* v. *Horne*, Willes, 208; *Baxter* v. *Hozier*, 5 Bing. N. C. 288.

That the defendant did render a reasonable account: *Baxter* v. *Hozier*, 5 Bing. N. C. 288; *Beer* v. *Beer*, 12 C. B. 60.

See other pleas in the above cases.

Accounts Stated (*c*).

General Issue.

"Never indebted," *ante*, p. 397.

(*a*) In the action of account there is no general issue. (1 Chit. Pl. 7th ed. 515.)

In the Statute of Limitations, 21 Jac. I. c. 16, an exception was made of "such accounts as concern the trade of merchandise between merchant and merchant, and their factors and servants" (*Inglis* v. *Haigh*, 8 M. & W. 769); but this exception is repealed by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 9.

(*b*) In an action by one tenant in common against another, under the 4th Anne, c. 16, s. 27 (*ante*, p. 49), the plea denying that defendant was bailiff would be insufficient; the plea should deny that defendant was tenant in common. (*Eason* v. *Henderson*, 12 Q. B. 986; *Beer* v. *Beer*, 12 C. B. 60.)

(*c*) As to the effect of the plea of the general issue "never indebted" to a count on accounts stated, see *ante*, p. 400. All defences by way of confession and avoidance of the debt must be specially pleaded, see *ante*, p. 399. It often happens that the accounts stated charged in the declaration were

ACTION PENDING.

Plea of another action pending for the same cause—see "*Abatement*," *ante*, p. 409.

ADMINISTRATORS. See "*Executors*," *post*, p. 493.

AGENTS.

General Issue (*a*).

"Never indebted," see *ante*, p. 397. "Non assumpsit," see *ante*, p. 401.

Plea to an Action for not accounting for the Sale of Goods, that the Defendant did not sell.

That he did not sell or dispose of the said goods or any of them.

Plea to a similar Action, that the Plaintiff did not request the Defendant to account.

That the plaintiff did not request the defendant to render to the plaintiff an account of the sale of the said goods or any of them, or of the moneys arising from such sale. [*See Topham* v. *Braddick*, 1 Taunt. 572.]

Plea to a similar Action, that the Defendant did account.

That he did render to the plaintiff a just and true account of the sale of the said goods and of the moneys arising from such sale.

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stated respecting debts also sued for in the declaration, and that the same defence applies to the original debts and to the claim on the accounts stated. In such cases the plea may be addressed to both claims (see *ante*, p. 385), and if the claim under the accounts stated is not incidentally answered, it may be expressly pleaded to at the end of the plea, thus:—"And the said accounts stated were stated of and concerning the said goods sold and delivered [*or* work done, *or* bill *or* note, *or as the case may be*], and not otherwise."

(*a*) To the indebitatus counts by agents (*ante*, p. 50), the plea of *never indebted* puts in issue the retainer and contract of agency; the work, etc., done under it, and the reasonableness of the charges. And see further as to the effect of this plea, *ante*, p. 32, n. (*b*), p. 400.

To the special counts by or against agents (*ante*, p. 51), the general issue of *non-assumpsit* puts in issue the contract of agency as alleged in the declaration. The matters performed under the contract, precedent to the cause of action, as the sale and disposal of goods, the request to account, etc., must be denied by common traverses, of which examples are given above. The denial in such pleas must be specific, whether the matters denied are alleged specifically in the declaration or are involved in the general allegation of the performance of conditions precedent. The breaches of contract charged may be denied by traverses of the specific acts alleged.

Plea on equitable grounds, that the defendant contracted as agent only, and signed the contract so as to make himself liable as principal, contrary to the intentions both of the plaintiff and defendant: *Wake* v. *Harrop*, 30 L. J. Ex. 273; 6 H. & N. 768.

ALIEN ENEMY. See "*Abatement*," *ante*, *p.* 410.

ALTERATION OF WRITTEN CONTRACTS (*a*).

Plea that a Written Contract was made void by an Alteration.

That the said contract was made in writing and signed by the defendant, and afterwards and whilst the said contract in writing

(*a*) When a deed is altered in a material point by the plaintiff, or even by a stranger without the privity of the plaintiff, it is thereby made void. (*Pigot's Case*, 11 Co. Rep. 27 *a*; *Sheppard's Touchstone*, 68, 69; *Davidson* v. *Cooper*, 13 M. & W. 343, 352); and the same rule applies to instruments of contract not under seal. (*Davidson* v. *Cooper*, 13 M. & W. 343, 352; *Mollett* v. *Wackerbarth*, 5 C. B. 181, 194.) But if the instrument is not in the possession of the plaintiff, and if he is not responsible for its safe custody, the alteration by a stranger it seems would not avoid it. (See *Henfree* v. *Bromley*, 6 East, 309; *Davidson* v. *Cooper*, 13 M. & W. 343, 353.) The alteration vitiates the whole instrument although it may not be made in the particular part declared upon. (*Mollett* v. *Wackerbarth*, 5 C. B. 181.)

An alteration by a stranger without the privity of the plaintiff in a point not material does not avoid the instrument. (*Pigot's Case*, 11 Co. Rep. 27 *a*.; *Waugh* v. *Bussell*, 5 Taunt. 707; *Trew* v. *Barton*, 1 C. & M. 533.)

An alteration may be accounted for on the ground of accident, and the original state of the instrument shown by parol evidence (*Sheppard's Touchstone*, 69), as that the seal of a deed had been torn off by a child (*Argoll* v. *Cheney*, Palm. 402, 403), or eaten off by rats (*Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 259, 263). So, an alteration may be shown to have been made by mistake, without any intention of altering the instrument. (*Raper* v. *Birkbeck*, 15 East, 17; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Novelli* v. *Rossi*, 2 B. & Ad. 757.)

An alteration made by consent of both parties amounts to a new contract, which supersedes the original contract (see *post*, "*Rescission of Contract*"), unless it is made only for the purpose of correcting a mistake in the original contract, and to carry out the original intention of the parties. (See *Cole* v. *Parkin*, 12 East, 471, 475.) In such case, if the original contract is sufficiently stamped, the amended contract does not require a new stamp, unless the amendment has so altered the nature of the contract as to make a different stamp necessary. (*Robinson* v. *Touray*, 1 M. & S. 217; *Jacob* v. *Hart*, 6 M. & S. 142; *Byrom* v. *Thompson*, 11 A. & E. 31; and see *post*, "*Bills of Exchange*," p. 456.)

The defence that a written contract has been altered after it was made must be specially pleaded when the instrument is declared upon its original form, and the plaintiff is able to prove it; where the alteration is such as to produce an insuperable variance between the contract as charged in the declaration in its original form and as it is produced in evidence, or when it makes the instrument inadmissible for want of a stamp, the defendant

was in the possession and custody of the plaintiff, it was rendered void by being materially altered, without the consent or knowledge of the defendant, that is to say, by [*here state the alteration made, as* affixing a seal by and near the signature of the defendant as and for the seal of the defendant, *or* altering the words twenty shillings per bushel into thirty shillings per bushel, *or as the case may be, so as to show the materiality of the alteration. If the declaration shows that the contract was in writing, the first allegation may be omitted.*]

A like plea: Mollett v. *Wackerbarth*, 5 C. B. 181.

Plea that the agreement was altered by affixing a seal so as to make it purport to be a deed of the defendant: Davidson v. *Cooper*, 11 M. & W. 778; 13 M. & W. 343.

Plea that a charter-party was altered by the insertion of material words: Croockewit v. *Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893 (*a*).

Plea that a mortgage-deed was altered by increasing the amount of the debt secured: Stobart v. *Dryden*, 1 M. & W. 615.

Plea that a bond of guarantee was altered by inserting a condition that the giving time to the principal debtor should not discharge the sureties: Harden v. *Clifton*, 1 Q. B. 523.

Replication to a plea of release, that the deed was altered after execution, by inserting the amount: Fazakerley v. *M'Knight*, 26 L. J. Q. B. 30; 6 E. & B. 795.

Pleas of alterations in bills and notes, post, "*Bills*," *p.* 456.

Ambassador.

Plea to the jurisdiction, that the defendant is an alien, and is ambassador and public minister of a foreign state, and received as such by the Queen: Magdalena Steam Nav. Co. v. *Martin*, 28 L. J. Q. B. 310. [*See the authorities collected in Taylor* v. *Best*, 14 C. B. 487.]

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may take advantage of it under the general issue. Wherever the contract is declared on in its altered form, as the defendant did not in fact make the contract alleged, he may raise the defence under *non assumpsit* or *non est factum*. (*Waugh* v. *Bussell*, 5 Taunt. 707; *Hemming* v. *Trenery*, 9 A. & E. 926; *Davidson* v. *Cooper*, 11 M. & W. 778; *Heath* v. *Durant*, 12 M. & W. 438; *Croockewit* v. *Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893; *Mason* v. *Bradley*, 11 M. & W. 590; and see 2 Taylor on Ev. 3rd ed. p. 1461; and *post*, "*Bills*," p. 456 (*a*).)

As to alterations in contracts by new agreements between the parties, see *post*, "*Rescission of Contract*."

(*a*) In this case, a replication that the alteration was made by a third party without the knowledge of the plaintiff, and that he offered to erase the alteration, and did erase it upon the defendant objecting thereto, was held a bad replication.

Annuity.

General Issue (*a*).

"Non est factum," *ante*, *p.* 403.

Plea that no memorial was enrolled pursuant to 53 *Geo. III. c.* 141: *Cumberland* v. *Kelly*, 3 B. & Ad. 602; *Frost* v. *Frost*, 3 B. & Ad. 612; *Marriage* v. *Marriage*, 1 C. B. 761; *Hewkins* v. *Bennett*, 30 L. J. C. P. 193.

Plea stating that the deed was given for a pecuniary consideration, so as to be within the statute, and that no memorial was enrolled: Frost v. *Frost*, 3 B. & Ad. 612; *Hick* v. *Keats*, 4 B. & C. 69; *Evatt* v. *Hunt*, 2 E. & B. 374.

Plea that the memorial enrolled is defective: Flight v. *Buckeridge*, 3 Bing. 216; *Darwin* v. *Lincoln*, 5 B. & Ald. 445.

Pleas of the redemption of the annuity, under the deed: Lane v. *Drinkwater*, 1 C. M. & R. 599; *Bostock* v. *Hume*, 7 M. & G. 893.

Apprentice. See *ante*, *p.* 55.

General issue.

"Non est factum," *ante*, *p.* 403.

Arbitration and Award.

I. Pleas to Actions on Awards.

General Issue (*b*).

"Never indebted," *ante*, *p.* 397; "Non assumpsit," *ante*, *p.* 401; "Non est factum," *ante*, *p.* 403.

(*a*) In an action on an annuity deed, the general issue *non est factum* denies the execution of the deed, and obliges the plaintiff to prove a deed agreeing with that alleged in the declaration.

The stat. 53 Geo. III. c. 141, required the enrolment of a memorial of annuity deeds falling within the description contained in that statute. But it has been repealed by 17 & 18 Vict. c. 90, except as regards the rights and remedies or liabilities of any person in respect of any act done previously to that Act. The want of the enrolment of a sufficient memorial, when required, is a defence to an action on an annuity deed, and must be specially pleaded. (*Mestayer* v. *Biggs*, 2 Dowl. 695; *Massey* v. *Nanny*, 3 Bing. N. C. 480.) But as such a defence can seldom occur in future, it is deemed sufficient merely to refer, as above, to the pleadings arising upon it.

(*b*) The general issue *never indebted* to an indebitatus count on an award or umpirage, denies the submission to arbitration; the appointment of an umpire where required by the submission; the enlargement of the time, when necessary; and the making of an award according to the submission, in conformity with that alleged in the count. Notice of the award is not a condi-

Pleas denying a submission by judge's order: Hatton v. *Royle,* 3 H. & N. 500.

Plea denying the making of the Award (*a*).

That the said *G. H.* did not make any such award of and concerning the said matters referred to him as alleged.

Plea of no award under an arbitration bond: Fisher v. *Pimbley,* 11 East, 188; *Mitchell* v. *Stavely,* 16 East, 58.

Pleas that the award was not final, setting out the award and showing in what respect: Duckworth v. *Harrison,* 4 M. & W. 432; *Gisborne* v. *Hart,* 5 M. & W. 53; *Perry* v. *Mitchell,* 12 M. & W. 792; *Williams* v. *Wilson,* 9 Ex. 90.

Plea that the award included matters which had not been referred: Charleton v. *Spencer,* 3 Q. B. 693.

Plea of revocation of the arbitrator's authority: Marsh v. *Bulteel,* 5 B. & Ald. 507; *Northampton Gas Co.* v. *Parnell,* 15 C. B. 638 (*b*).

Plea of accord and satisfaction to an action on an award to pay money by instalments: Smith v. *Trowsdale,* 3 E. & B. 83.

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tion precedent to its validity, unless specially provided for, because it is equally within the notice of both parties. (2 Wms. Saund. 62.)

The general issue of *non assumpsit* to a special count on an award puts in issue the submission, where the reference is founded on a submission by agreement; where the reference is made by order of the court or a judge, such plea is inapplicable; and the order should be traversed in terms. The appointment of an umpire, the enlargement of the time and the making of an award agreeing with that alleged, must, if denied, be traversed in terms according to the allegations in the declaration.

(*a*) Under this plea advantage may be taken of the invalidity of the award, on the ground that all the matters in dispute were not determined by it (*Dresser* v. *Stansfield,* 14 M. & W. 822; *Roberts* v. *Eberhardt,* 27 L. J. C. P. 70; 3 C. B. N. S. 482; *Armitage* v. *Coates,* 4 Ex. 641); or that other matters than those referred were involved in the determination (*King* v. *Bowen,* 8 M. & W. 625); or that the award was not executed in pursuance of the submission (*Wade* v. *Dowling,* 4 E. & B. 44): but where the award was in fact made duly according to the submission and concerning the matters referred, the defendant cannot take advantage under this issue of its invalidity in point of law (*Adcock* v. *Wood,* 6 Ex. 814); nor can he show that it has subsequently been set aside (*Roper* v. *Levy,* 21 L. J. Ex. 28); nor that the award was not in fact the decision of the arbitrators, but that of a person to whom the arbitrators referred it (*Whitmore* v. *Smith,* 29 L. J. Ex. 402; 31 L. J. Ex. 107; 5 H. & N. 824); nor that the arbitrator was guilty of misconduct for which the award ought to be set aside. (*Ib.*)

If the terms of the award exceed the powers of the arbitrator and the defect appears on the declaration, the defendant may raise the objection by demurrer. (See *Skipper* v. *Grant,* 10 C. B. N. S. 237.)

(*b*) Where the submission is by rule of court, or may be made a rule of court (C. L. P. Act, 1854, s. 17), the power of the arbitrator is not revocable without the leave of the court or a judge. (3 & 4 Will. IV. c. 42, s. 39.)

II. Pleas of Reference to Arbitration and Award (*a*).

Plea of a reference by a Judge's Order and Award respecting the Cause of Action.

That after the accruing of the alleged causes of action, certain differences respecting the same were depending between the plaintiff and the defendant, and the plaintiff had commenced an action in the court of —— at Westminster, against the defendant in respect of certain of the said matters then in difference between them, and thereupon by an order made on the —— day of ——, A. D. ——, in the said action, by one of the judges of the said court, by the consent of the plaintiff and the defendant, it was ordered that the said action and all matters in difference between the plaintiff and the defendant should be referred to the arbitration of *J. K.*, so as he should make his award in writing respecting the said matters re-

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(*a*) A stipulation in an agreement to refer disputes to arbitration does not oust the jurisdiction of the court, and is no answer to an action for a breach of the agreement (*Thompson* v. *Charnock*, 8 T. R. 139; *Scott* v. *Avery*, 8 Ex. 487; 25 L. J. Ex. 308; 5 H. L. C. 811; *Horton* v. *Sayer*, 29 L. J. Ex. 28; 4 H. & N. 643); so a plea of an arbitration actually pending touching the cause of action is no defence. (*Harris* v. *Reynolds*, 7 Q. B. 71.) If the award is made, it is conclusive as to the amount of damages. (*Whitehead* v. *Tattersall*, 1 A. & E. 491.) And if the award is made and performed, these facts will afford an answer to an action for the subject-matter of the reference. (*Allen* v. *Milner*, 2 C. & J. 47.) The defence then appears to resolve itself into one of accord and satisfaction. As to when it may be a defence without performance, see *ib.*

Where an agreement makes it a condition precedent that the amount of damage or the time of paying it, etc., shall be ascertained by a reference to arbitration, it is a bar to an action until the condition has been satisfied. (*Avery* v. *Scott*, *supra*; *Brown* v. *Overbury*, 11 Ex. 715; 25 L. J. Ex. 169; *Scott* v. *Corporation of Liverpool*, 28 L. J. C. 230; *Braunstein* v. *Accidental Death Ins. Co.*, 31 L. J. Q. B. 17; *Tredwen* v. *Holman*, 10 W. R. Ex. 652.)

By the C. L. P. Act, 1854, s. 11, "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require." As to when this section is applicable, see *Pennell* v. *Walker*, 18 C. B. 651; 26 L. J. C. P. 9; *Blythe* v. *Lafone*, 28 L. J. Q. B. 164.

ferred, ready to be delivered to the said parties on or before the —— day of ——, A. D. —— [or any further day to which the said arbitrator should enlarge the time for making the said award], and that the plaintiff and the defendant should in all things abide by, perform, and keep the said award; and the said *J. K.*, in pursuance of the said order, took upon himself the said arbitration, and [having duly enlarged the time for making the said award until the —— day of ——, A. D. ——] duly made his award in writing respecting the said matters referred ready to be delivered to the said parties before the last-mentioned day; and the alleged causes of action were matters in difference between the plaintiff and the defendant within the meaning of the said order, and were so referred and arbitrated upon as aforesaid; and the plaintiff and defendant have duly abided by, performed, and kept the said award, and all matters and things thereby ordered and determined.

Plea of reference by an order of nisi prius and award: Smalley v. *Blackburn Ry. Co.*, 2 H. & N. 158; 27 L. J. Ex. 65.

Plea of a Reference by Agreement and Award respecting the Cause of Action.

That after the accruing of the alleged causes of action certain differences respecting the same were depending between the plaintiff and the defendant; and thereupon it was agreed by and between them, that the said causes of action, and all matters in difference respecting the same should be, and the same were thereby referred to the arbitration of *J. K.*, so as he should make his award in writing respecting the said matters referred, ready to be delivered to the said parties on or before the —— day of ——, A. D. ——; and the said *J. K.* took upon himself the said arbitration, and duly made and published his award in writing respecting the said matters referred, ready to be delivered to the said parties before the last-mentioned day, and thereby awarded that the defendant, in respect of the said matters, should pay the plaintiff £—— on the —— day of —— then next; and the defendant on the day last aforesaid paid the said £—— in pursuance and performance of the said award.

Like pleas: Allen v. *Milner*, 2 C. & J. 47.

A like plea with payment into court of the sum awarded: Roper v. *Levy*, 7 Ex. 55.

Plea of an award respecting the cause of action, settling a sum to be deducted from the claim: Parkes v. *Smith*, 15 Q. B. 297.

Plea to an action on a policy of insurance, that by the conditions of the policy differences relative to the settling of the amount of loss should be referred to arbitration, and that no action should be brought until the award should have been obtained: Scott v. *Avery*, 8 Ex. 487; 22 L. J. Ex. 287; S. C. in H. L. 25 L. J. Ex. 308.

Pleas under the Friendly Societies Acts, that by the rules of the society all disputes should be referred to arbitration: see post, "Friendly Societies."

Plea that other matters were in difference between the plaintiff and the defendant, in respect of which another action was pending; and

that in consideration that the defendant would agree to refer the other action to arbitration, the plaintiff accepted such agreement in satisfaction of the cause of action pleaded to: Williams v. *London Commercial Exchange Co.;* 10 Ex. 569.

Replications to the Plea of an Arbitration and Award.

The plaintiff may take issue on the plea, or special replications may be framed from the pleas to actions on awards, *ante,* p. 422.

Assignees.

Plea denying that the Plaintiffs are Assignees (a).

That the plaintiff [*or* plaintiffs] was not nor is [*or* were not nor are] assignee [*or* assignees] as alleged.

Notice to be given with the above Plea (b).

In the ——.

A. B. [and *C. D.*] suing as assignee [*or* assignees] of *E. F.*, an alleged bankrupt, plaintiff [*or* plaintiffs] against *J. K.*, defendant.

Take notice that the above-named defendant intends on the trial of this cause to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt, of the above-named *E. F.* [*or such only*

(*a*) By r. 5, T. T. 1853, in all actions by assignees of a bankrupt or insolvent, the character in which the plaintiff is stated on the record to sue, shall not in any case be considered as in issue, unless specially denied.

The plea denying that the plaintiffs are assignees, puts in issue all the proceedings in bankruptcy or insolvency necessary to establish the title of the assignees, as, in bankruptcy, the trading (when necessary), the act of bankruptcy, the petitioning creditor's debt, and the adjudication. (*Butler* v. *Hobson,* 4 Bing. N. C. 290; *Buckton* v. *Frost,* 8 A. & E. 845.)

If all the assignees do not join in suing, the defendant may plead in abatement the non-joinder (*Snelgrove* v. *Hunt,* 2 Stark. 424); or he may traverse that the plaintiffs are assignees, and show under that issue that another assignee is not joined. (*Jones* v. *Smith,* 1 Ex. 831.) Where the assignees are suing without the leave of the Court of Bankruptcy, which is required by the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 153, the court in which the action is brought cannot stay the proceedings (*Lee* v. *Sangster,* 26 L. J. C. P. 151); nor, it seems, can the objection be taken advantage of by plea. (See *Hollis* v. *Marshall,* 27 L. J. Ex. 235, 237.)

(*b*) By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 234, "In any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court for anything done under such warrant, no proof shall be required at the trial of the petitioning creditor's debt, or of the trading or act of bankruptcy respectively, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff before issue joined, give notice in

of these matters as the defendant intends to dispute.] Dated the —— day of —— A. D. ——.

Yours, etc.

To *A. B.* [and *C. D.*] the above-named plaintiff [*or* plaintiffs], and to *G. H.*, his [*or* their] attorney or "agent."

L. M., defendant's attorney [*or* agent].

Plea to an Action by Assignees for a Debt due to the Bankrupt, of a bonâ fide payment to the Bankrupt without Notice of a previous Act of Bankruptcy. (12 & 13 *Vict. c.* 106, *s.* 133.)

That after the accruing of the alleged causes of action, and before the filing of the petition for adjudication of bankruptcy under which the plaintiffs are such assignees as aforesaid, the defendant really and bonâ fide paid to the said *E. F.*, who then accepted and received from the defendant moneys to the amount of the claim herein pleaded to, in satisfaction and discharge of the said causes of action, and the defendant had not at the time of such payment notice of any prior act of bankruptcy committed by the said *E. F.* [*This defence must be specially pleaded where the payment was made after an act of bankruptcy.* (*Kynaston* v. *Crouch*, 14 M. & W. 266.)]

Plea that the bankrupt before bankruptcy had assigned the debt to a third party, with notice of the assignment to the defendant: Leslie v. *Guthrie*, 1 Bing. N. C. 697. *And see as to this defence, Tibbits* v. *George*, 5 A. & E. 107; *Gale* v. *Lewis*, 9 Q. B. 730; *Belcher* v. *Campbell*, 8 Q. B. 1; *Pott* v. *Lomas*, 30 L. J. Ex. 210; *post*, "*Bankruptcy*," p. 445.

A like plea to an action by the assignees of an insolvent debtor; and a replication that the assignment was voluntary, made when the assignor was in insolvent circumstances, and within three months of the imprisonment: Peacock v. *Harris*, 5 A. & E. 449.

Pleas of set-off and mutual credit in actions by assignees: see post, "*Set-off*."

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writing to such assignees or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs such other party would otherwise be entitled to receive from such assignees or other person."

As to the particularity required in this notice, and the practice relating thereto, see *Hernamann* v. *Barber*, 15 C. B. 774; *Trimley* v. *Unwin*, 6 B. & C. 537; *Porter* v. *Walker*, 1 M. & G. 686; Chit. Forms, 9th ed. 718.

ATTACHMENT OF DEBT.

Plea to Declaration against Garnishee. (*R. G. M. V.* 1854, *Sched.* 26.) *See ante, p.* 389.

Plea, to a declaration against garnishee, that the plaintiff took the judgment debtor in execution; Juaralde v. *Parker,* 6 H. & N. 431; 30 L. J. Ex. 237 (*a*).

Plea of Payment to a Judgment Creditor of the Plaintiff or of Execution levied under an order of Attachment under the C. L. P. Act, 1854 (*b*).

That after the accruing of the plaintiff's claim, *J. K.* obtained a

(*a*) A judgment creditor may attach a debt owing to the judgment debtor, notwithstanding the judgment debtor has taken his debtor in execution for it. (*Hartley* v. *Shemwell,* 1 E. B. & S. 1; 30 L. J. Q. B. 223.)

(*b*) By the C. L. P. Act, 1854, s. 61, it is enacted that "It shall be lawful for a judge, upon the *ex parte* application of a judgment creditor, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge, or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

By s. 62, "Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands."

By s. 63, "If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt."

By s. 64, "If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under the Common Law Procedure Act, 1852."

By s. 65, "Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed."

The order of attachment is no defence to an action at the suit of the assignees in bankruptcy of the judgment debtor, unless followed by payment or execution levied under a judge's order, which would discharge the debt under the 65th section. (*Holmes* v. *Tutton,* 24 L. J. Q. B. 346; 5 E. & B. 65.) But the judgment creditor is a creditor having security within s. 184

judgment in the Court of ——, at Westminster, for £——, against the now plaintiff, and was a judgment-creditor of the now plaintiff within the meaning of the Common Law Procedure Act, 1854, to that amount; and afterwards in pursuance of the said Act the said *J. K.*, as and being such judgment-creditor as aforesaid, made an *ex parte* application to a judge of the said court [*or* of the Court of —— at Westminster] upon affidavit by himself [*or* his attorney] duly made, stating that such judgment had been recovered, and that it was still unsatisfied to the amount of the said £—— [*or* of £——], and that the defendant was indebted to the now plaintiff, and was within the jurisdiction of the said court; whereupon it was in pursuance of the said Act duly ordered by the said judge that all debts owing or accruing from the now defendant to the now plaintiff, should be attached to answer the said judgment-debt, and that the now defendant should appear before the said judge to show cause why he should not pay the said *J. K.* the debt due from the now defendant to the now plaintiff, or so much thereof as might be sufficient to satisfy the said judgment-debt, and the said order was duly served on [*or* notice of the said order was duly given in such manner as the said judge directed to] the now defendant; and the now defendant did not forthwith pay into court the amount due from him to the now plaintiff, or any part thereof, and did not dispute the debt due from him to the now plaintiff; whereupon it was in pursuance of the said statute duly ordered by the said judge that execution should issue to levy the amount due from the defendant as aforesaid, being the amount of the claim herein pleaded to, towards satisfaction of the said judgment-debt [*following the terms of the order*]; and the last-mentioned order was duly served on the defendant, and afterwards the defendant paid to the said *J. K.*, under such proceedings as aforesaid, the amount of the claim herein pleaded to [*or if execution issued, instead of alleging payment say:* and such proceedings were thereupon had that afterwards the amount of the claim herein pleaded to was duly levied by execution upon the defendant under such proceedings as aforesaid].

A like plea: *Lockwood* v. *Nash*, 18 C. B. 536.

Pleas of foreign attachment in the Lord Mayor's Court, and execution had of the debt in the hands of the defendant as garnishee (a):

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of the Bankrupt Law Consolidation Act, 1849. (*Ib.*; and see *Tilbury* v. *Brown*, 30 L. J. Q. B. 46.) It appears to be doubtful whether the garnishee is justified in paying the judgment creditor, unless the judge's order for execution has been obtained (*Turner* v. *Jones*, 1 H. & N. 878; 26 L. J. Ex. 262); though it seems he might pay after such order without service of it. (*Cooper* v. *Brayne*, 27 L. J. Ex. 446.) An order for execution under s. 63 has no operation upon debts assigned by the judgment debtor previously to the first order. (*Hirsch* v. *Coates*, 18 C. B. 757.) As to the effect of an order under s. 61 against debts already under notice of attachment by a third party, see *Newman* v. *Rook*, 4 C. B. N. S. 434. The statute applies where the judgment-debtor is an executor or administrator, in respect of debts due to him in his representative capacity. (*Burton* v. *Roberts*, 29 L. J. Ex. 484.) As to what debts may be attached under the above provisions, and further as to the proceedings, see 1 Chit. Pr. 11th ed. 699.

(*a*) A garnishee in a foreign attachment in the Lord Mayor's Court is discharged from the debt attached, after judgment against him and execu-

Magrath v. *Hardy*, 4 Bing. N. C. 782; *Crosby* v. *Hetherington*, 4 M. & G. 933; *Webb* v. *Hurrell*, 4 C. B. 287.

A like plea and a replication that the plaintiff sued as trustee, and that the custom did not extend to debts held in trust: Westoby v. *Day*, 2 E. & B. 605.

Plea that the debt was fenced and arrested in Scotland by the law of Scotland: M'Leod v. *Schultze*, 1 D. & L. 614.

Plea of attachment of the debt in the State of New York by the law of that State: Gould v. *Webb*, 4 E. & B. 933.

Plea of attachment of the debt in France by the law of France: Simian v. *Miller*, 1 C. B. N. S. 686.

Attainder (*a*).

Plea of the attainder of the plaintiff by conviction of felony: Bullock v. *Dodds*, 3 B. & Ald. 258; *and see Smethurst* v. *Tomlin*, 30 L. J. P. 269; *Lambert* v. *Taylor*, 4 B. & C. 138.

A like plea, puis darrein continuance: Barnett v. *London and North Western Ry. Co.*, 29 L. J. Ex. 334; 5 H. & N. 604.

Attorneys.

General Issue (*b*).

"Never indebted," *ante*, p. 397; "Non assumpsit," *ante*, p. 401.

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tion executed: Locke on Attachment, 20; *Newman* v. *Rook*, 4 C. B. N. S. 434; 1 Chit. Pr. 11th ed. 705. A foreign attachment may be pleaded as a defence arising after action brought, or *puis darrein continuance*. (*Webb* v. *Hurrell*, 4 C. B. 287.) As to the limits of jurisdiction in foreign attachment in the Lord Mayor's Court, see *Cox* v. *Mayor of London*, 10 W. R. Ex. 694.

(*a*) The plea of the attainder of the plaintiff by conviction of felony may be pleaded either in abatement or in bar. (1 Chit. Pl. 7th ed. 462.)

(*b*) The general issue *never indebted* to the indebitatus count for an attorney's bill, denies that the plaintiff was an attorney, that the defendant retained him, that the work charged was done under the retainer, and that the charges are reasonable and proper. (*Jones* v. *Nanney*, 1 M. & W. 333; *Hill* v. *Allen*, 2 M. & W. 204.) The general issue *non assumpsit* to a special count against an attorney for negligence, puts in issue the promise, and that the plaintiff retained the defendant to do the work in question, when the retainer is alleged as the concurrent consideration for the promise; the retainer may be specifically traversed where it is alleged as an executory consideration. The negligent performance of the work must be specifically traversed. When the action is framed as upon a wrong (see *ante*, p. 240), the proper mode of denying the negligence is by the general issue not guilty.

Plea to a special count against an Attorney, denying the Retainer.

That the plaintiff did not retain the defendant, nor did the defendant accept the said retainer as alleged.

Plea that the Plaintiff was not admitted [or enrolled] as an Attorney. (6 & 7 *Vict. c.* 73, *s.* 35 (*a*).)

That this action was brought and is maintained and prosecuted for the recovery of fees, reward and disbursements on account of the prosecuting and defending, by the plaintiff for the defendant, of certain actions, suits and proceedings in courts of law and equity in the plaintiff's own name [*or* in the name of another person] after the passing of the statute passed in the seventh year of the reign of Queen Victoria, for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales, without the plaintiff being admitted [*or* enrolled] as required by the said statute.

Like pleas: Middleton v. *Chambers*, 1 M. & G. 97; *Williams* v. *Jones*, 2 Q. B. 276.

Plea that the Plaintiff had not taken out a Certificate. (6 & 7 *Vict. c.* 73, *s.* 26 (*b*).)

That this action was brought and is maintained for the recovery of fees, reward and disbursements for business, matters and things

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(*a*) The defences under 6 & 7 Vict. c. 73, that the plaintiff was not admitted an attorney, that he had not taken out a certificate, that he did not deliver a bill a month before action, must be specially pleaded (*Lane* v. *Glenny*, 7 A. & E. 83; *Hill* v. *Sydney*, 7 A. & E. 956; *Robinson* v. *Roland*, 6 Dowl. 271); they are issuable pleas (*Wilkinson* v. *Page*, 1 D. & L. 913).

If the declaration charges the defendant in respect of work done by the plaintiff as an attorney "and otherwise" (see *ante*, pp. 33, 66), the pleas setting up the above defences must be limited to the work done as an attorney. The commencement of the pleas should then be as follows, "except as to so much of the declaration as relates to work done by the plaintiff otherwise than as an attorney and solicitor;" and the reference in the body of the pleas to what the action is brought for should be limited thus, "this action, so far as relates to the causes of action herein pleaded to."

By 6 & 7 Vict. c. 73, s. 35, it is enacted, "That from and after the passing of this Act, in case any person shall in his own name or in the name of any other person sue out any writ or process, or commence, prosecute or defend, any action or suit, or any proceeding in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceeding respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on or defending any such action, suit or proceeding, or otherwise in relation thereto; and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on or defended, and shall and may be punished accordingly."

(*b*) By the 6 & 7 Vict. c. 73, s. 26, it is enacted, "That no person who as an attorney or solicitor shall sue, prosecute, defend or carry on any action or suit, or any proceedings, in any of the courts aforesaid (*i. e.* those mentioned n. s. 2), without having previously obtained a stamped certificate

done by the plaintiff as an attorney and solicitor for the defendant in suing, prosecuting, defending, or carrying on actions, suits, or proceedings in some or one of the superior courts at Westminster after the passing of the statute passed in the seventh year of the reign of Queen Victoria for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales, without the plaintiff having previously obtained a stamped certificate then in force, authorizing him to practise as an attorney or solicitor.

Like pleas: Richards v. *Lord Suffield*, 2 Ex. 616; *Greene* v. *Reece*, 8 C. B. 88.

Plea that the Plaintiff did not deliver a Bill a Month before Action. (*6 & 7 Vict. c. 73, s. 37 (a).*)

That this action was commenced and is maintained for the recovery of fees, charges and disbursements for business done by the plaintiff as an attorney and solicitor for the defendant, and for no other cause; and the plaintiff did not one calendar month

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which shall be then in force, shall be capable of maintaining an action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid."

This section only disables an uncertificated attorney from suing for fees or disbursements for any business done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the Act (see s. 2), and not for business done by him which had no reference to such suits or proceedings. (*Richards* v. *Lord Suffield*, 2 Ex. 616; *Greene* v. *Reece*, 8 C. B. 88.) As to limiting the plea, see the preceding note.

By the 23 & 24 Vict. c. 127, s. 26, it is enacted, that "Every person who acts as an attorney or solicitor contrary to the enactment in section 2 of the first hereinbefore-mentioned Act (6 & 7 Vict. c. 73), or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court of Divorce and Matrimonial Causes, without being duly qualified so to act, shall be deemed guilty of contempt of the court in which the action, suit, cause, matter or proceeding in relation to which he so acts is brought, had or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done, or any disbursement made by him in the course of so acting; and shall, in addition to any other penalty or forfeiture, and to any disability to which he may be subject, forfeit and pay for every such offence the sum of £50."

(*a*) By the 6 & 7 Vict. c. 73, s. 37, it is enacted, "That from and after the passing of this Act, no attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or

before action deliver to the defendant, being the party to be charged therewith, or send by the post to, or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements subscribed with the proper hand of the plaintiff, either with his own name, or with the name or style of any partnership of which he was at any time a member, or enclosed in or accompanied by a letter subscribed in like manner referring to such bill, as required by the statute passed in the seventh year of the reign of Queen Victoria for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales.

Like pleas: Engleheart v. *Moore*, 4 D. & L. 60; *Brooks* v. *Bockett*, 9 Q. B. 847; *Scadding* v. *Eyles*, 9 Q. B. 858; *Blandy* v. *De Burgh*, 6 C. B. 623; *Lewis* v. *Primrose*, 6 Q. B. 265.

A like plea by joint defendants: Mant v. *Smith*, 28 L. J. Ex. 234.

Replication that the Plaintiff did deliver a Bill.

That he did one calendar month before action deliver to the defendant [*or* send by the post to the defendant, *or* leave for the defendant at his counting-house *or* office of business *or* dwelling-house *or* last known place of abode, *as the case may be*] a bill of the said fees, charges, and disbursements subscribed [*or* enclosed in *or* accompanied by a letter subscribed] with the proper hand of the plaintiff, with his own name [*or* the name and style of a partnership of which the plaintiff was a member] as required by the said statute.

Like replications: Engleheart v. *Moore*, 4 D. & L. 60; *Mant* v. *Smith*, 28 L. J. Ex. 234.

Plea to a Special Count against an Attorney for Negligence denying the Negligence.

That he did conduct the said action [*or* defence] with due and proper care, skill and diligence, as such attorney as aforesaid.

Plea to an Action for Abandoning the Prosecution [or Defence] of a previous Action, that the Defendant was not supplied with Funds by the Plaintiff.

That the retainer in the declaration mentioned was given and accepted as therein alleged upon and subject to the condition that the plaintiff should, within a reasonable time after a request to be made by the defendant to the plaintiff for such reasonable funds as should be necessary for the purpose of carrying on [*or* defending]

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with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill." As to limiting the plea, see *ante*, p. 431, n. (*a*); and as to applying it to the account stated (to which it is an answer), see *ante*, p. 418, n. (*c*).

An attorney may set off the amount of his costs, although he has not delivered a bill of costs before the action. (*Brown* v. *Tibbits*, 31 L. J. C. P. 206.)

the action in that count mentioned, supply the defendant with such reasonable funds as aforesaid or that the defendant should be at liberty to abandon the further prosecution [*or* defence] of the said action; and afterwards, and before the alleged breach, such reasonable funds as aforesaid became and were necessary for the purpose of carrying on [*or* defending] the said action, and the defendant then requested the plaintiff to supply the defendant with such funds as last aforesaid, for the purpose aforesaid, and gave the plaintiff notice that if he did not do so the defendant would abandon the further prosecution [*or* defence] of the said action, and a reasonable time for the plaintiff to have supplied the defendant with such funds as last aforesaid elapsed after the said request and before the alleged breach; yet the plaintiff neglected and refused to supply the defendant with such funds as last aforesaid, wherefore the defendant abandoned the further prosecution [*or* defence] of the said action, as he lawfully might for the cause aforesaid, which is the alleged breach.

Plea by an attorney of the privilege of being sued in the court of which he is an attorney: ante, p. 410.

Bail Bond (*a*).

General Issue.

"Non est factum," *ante,* p. 403.

Plea that the Bond was not assigned by the Sheriff.

That the said sheriff did not duly assign the said bond to the plaintiff according to the form of the said statute as alleged.

Plea that Bail was put in and perfected.

That the said *G. H.* did cause special bail to be put in for him to the said action in the said court as required by the said writ, and *O. P.* and *Q. R.*, according to the exigency of the said writ and the course and practice of the said court, came into the said court in their proper persons, and became pledge and bail [*here set out the recognizance of bail*], as by the record of the said recognizance remaining in the said court appears.

Plea that the plaintiff prevented the rendering by taking the debtor under a ca. sa.: Hayward v. *Bennett,* 3 C. B. 404.

Replication to the Plea that Bail was put in, Nul Tiel Record.

That there is not any record of the alleged recognizance remain-

(*a*) The plea of *non est factum* denies the execution of the bond. The parties executing the bond are estopped from denying the facts recited in it. Any circumstances tending to show that the bond is void, as on the ground of fraud or illegality, must be specially pleaded. *Taylor* v. *Clow,* 1 B & Ad. 223; *Finch* v. *Cocken,* 2 C. M. & R. 196.)

ing in the said court here; and the court here will advise themselves upon the inspection of the record above alleged; and a day is given to the said parties here until the —— day of ——, A.D. ——, to hear judgment thereon.

Bail, Recognizance of (*a*).

Plea of Nul Tiel Record.

That there is not any record of the alleged recognizance remaining in the said court.

Replication to the plea of nul tiel record, see post, "Judgments."

Plea that there was no Capias ad Satisfaciendum against the Principal.

That after the recovery of the said judgment and before this suit no writ of capias ad satisfaciendum was sued out of the said court here against the said *J. K.* upon the said judgment, and returned into the said court.

Like pleas: Sandon v. *Proctor*, 7 B. & C. 800; *Hinton* v. *Acraman*, 2 C. B. 367.

Replication that there was a Ca. Sa. against the Principal.

That after the recovery of the said judgment and before this suit on the —— day of ——, A.D. ——, the plaintiff sued out of the said court a writ of capias ad satisfaciendum upon the said judgment, against the said *J. K.*, directed to the sheriff of ——, by which said writ her Majesty the Queen commanded the said sheriff that he should [omit not by reason of any liberty in his said county, but that he should enter the same and] take the said *J. K.* if he should be found in the bailiwick of the said sheriff, and him safely keep so that the said sheriff should have his body before her said Majesty [*or* her justices, *or* her barons of the Exchequer], at Westminster, immediately after the execution thereof, to satisfy the plaintiff the said £—— [*the amount of the judgment*] which the plaintiff lately in her said court recovered against the said *J. K.* as aforesaid, whereof the said *J. K.* was convicted, together with interest upon the said sum, at the rate of £4 per centum per annum,

(*a*) The recognizance being matter of record is put in issue by the plea of *nul tiel record*. (See *post*, "*Judgment*.") A recognizance is not a record until enrolled. (*Glynn* v. *Thorpe*, 1 B. & Ald. 153.)

The defendants may plead that no writ of *ca. sa.* was issued against the principal (without which he is not required to render himself) (*Sandon* v. *Proctor*, 7 B. & C. 800; *Hinton* v. *Acraman*, 2 C. B. 367); or they may plead that the principal did render himself according to the recognizance; or that the plaintiff has been satisfied as to the judgment by payment or by execution under a *fi. fa.*; or that the principal died before the return of the *ca. sa.*

from the —— day of ——, A.D. ——, on which day the said judgment was entered up, and that the said sheriff should have there then the said writ; and the said writ was duly indorsed with a direction to the said sheriff to levy £—— and interest thereon, at £4 per cent. from the —— day of ——, A.D. ——, besides sheriff's poundage, officers' fees, and other expenses of the said execution; which said writ afterwards and before the return thereof, was delivered by the plaintiff to the sheriff of —— aforesaid, to be executed; and afterwards and before this suit, according to the course and practice of the said court, the said sheriff returned to the said court, on the said writ, that the said *J. K.* was not found in his bailiwick, as by the said writ of capias ad satisfaciendum and the return thereof remaining of record in the said court more fully appears, and the plaintiff prays that the said record may be inspected by the court here; and because the court here are not yet advised what judgment to give in the premises, a day is given to the said parties here until the —— day of ——, A.D. ——, to hear judgment thereon.

A like replication: Sandon v. *Proctor*, 7 B. & C. 800.

Bailments.

General Issue (*a*).

"Never indebted," *ante*, p. 397. "Non assumpsit," *ante*, p. 401.

Plea traversing the Bailment.

That the plaintiff did not deliver the said goods [*or* horse] to the defendant, nor did the defendant receive and have the same for the purpose and on the terms alleged.

Plea traversing the request to redeliver the Goods.

That the plaintiff did not request the defendant to re-deliver to him the said goods as alleged.

Plea traversing that a Reasonable Time had elapsed.

That a reasonable time for the redelivery of the said goods did not elapse after such request as aforesaid as alleged.

(*a*) The general issue *never indebted* to an indebitatus count for the custody of goods under a bailment denies the keeping of them at the defendant's request, and the reasonableness of the charges made.

The general issue *non assumpsit* to a special count framed on a contract denies the contract alleged; and puts in issue the express contract, if there be one, or the bailment of the goods and the other circumstances from which the contract might be implied (r. 6, T. T. 1853).

In actions framed on contracts, the breaches alleged must be specifically traversed. In actions framed on wrongs independent of contract, the general issue *not guilty* puts in issue the breaches. It is sometimes doubtful whether a count on a bailment is framed in contract or in tort (*Corbett* v. *Packington*, 6 B. & C. 268), particularly since the introduction of a less technical form of declarations. To obviate the doubt which might in such case

Plea traversing the Breach in not redelivering the Goods.

That he did redeliver the said goods to the plaintiff when he was so requested as aforesaid.

Plea traversing the Breach in not taking care of the Goods.

That he did safely keep and take care of the said goods while they were in his care and keeping as aforesaid.

Plea by a bailee to an action of trover, that the bailor's title had determined by the claim of the rightful owner: Thorne v. *Tilbury*, 27 L. J. Ex. 407; 3 H. & N. 534; *and see ante, p.* 254, *n., and post*, c. 6, "*Conversion.*"

Plea to a count for not redelivering a ship under a contract of bailment, that before the time for redelivery the bailors mortgaged it to a third party, who took it from the defendant: European and Australian Mail Co. v. *Royal Mail S. P. Co.*, 30 L. J. C. P. 247.

Plea by bailees that they received the goods upon the terms that they should not be responsible for them if the value was above £10, *which it was: Van Toll* v. *South-Eastern Ry. Co.*, 31 L. J. C. P. 241.

Bankruptcy.

See "*Assignees*," *ante*, p. 426.

Plea of the Bankruptcy of the Defendant under the 12 *&* 13 *Vict. c.* 106, *s.* 205, *or the* 24 *&* 25 *Vict. c.* 134, *s.* 161 (*a*).

That he became bankrupt within the meaning of the statutes in

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arise as to the appropriate form of the general issue, the C. L. P. Act, 1852, s. 74, after reciting that certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts, provides that any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong. As to the different effects of *non assumpsit* and of *not guilty* in such cases, see *ante*, p. 397 n.

(*a*) The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 205, enacts, "That any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim or demand proveable under his bankruptcy, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence; and such bankrupt's certificate shall be sufficient evidence of the trading bankruptcy, fiat, or petition for adjudication and other proceedings precedent to the obtaining such certificate."

The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, substitutes for the certificate an "order of discharge," and the effect of the order of discharge, as a defence to actions, is defined by s. 161, which is substituted for the above section of the Bankrupt Law Consolidation Act, 1849, and which enacts as follows:—"The order of discharge shall, upon taking effect, dis-

force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt.

Plea of the defendant's bankruptcy, upon an adjudication and certificate granted upon his own petition and declaration of insolvency, setting out the proceedings: *Warburg* v. *Tucker*, 5 E. & B. 384; 28 L. J. Q. B. 56.

Plea of the defendant's bankruptcy and certificate granted on the petition of a creditor, setting out the proceedings: *Young* v. *Winter*, 16 C. B. 404; 24 L. J. C. P. 214.

Plea of the defendant's discharge under the law of bankruptcy of the United States (a): *Potter* v. *Brown*, 5 East. 124.

Under a Scotch sequestration: *Sidaway* v. *Hay*, 3 B. & C. 12.

Under the insolvent law of the Cape of Good Hope: *Frith* v. *Wollaston*, 7 Ex. 194.

Under the insolvent law of the colony of Victoria: *Bartley* v. *Hodges*, 1 B. & S. 375; 30 L. J. Q. B. 352.

Plea, in an action for money paid as surety for the defendant, that the defendant became bankrupt, and the liability of the surety accrued before the bankruptcy: *Jackson* v. *Magee*, 3 Q. B. 48.

New assignment, to a plea of the defendant's bankruptcy in an action for not paying premiums on a policy of insurance, that the action was brought for the non-payment of premiums which became due since the bankruptcy: *Elder* v. *Beaumont*, 27 L. J. Q. B. 25; *and see* *Toppin* v. *Field*, 4 Q. B. 386; *Warburg* v. *Tucker*, 5 E. & B. 384; 28 L. J. Q. B. 56. [*But see now* "*The Bankruptcy Act*, 1861," 24 & 25 Vict. c. 134, s. 154.]

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charge the bankrupt from all debts, claims or demands proveable under his bankruptcy, save as herein otherwise provided (see s. 159); and if thereafter he shall be arrested, or any action shall be brought against him, for any such debt, claim or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge." It will be observed that the language of this section, in giving the plea, is the same as that of the Act of 1849. So that, in point of form, the plea of the bankruptcy of the defendant will remain as before, and it will be supported in the one case by proof of the certificate, and in the other by proof of the order of discharge.

The plaintiff may join issue upon the above plea, and may prove any facts which invalidate the certificate or order of discharge without pleading them specially. (*Hughes* v. *Morley*, 1 B. & Ald. 22.)

If the plaintiff relies on causes of action accruing since the bankruptcy, it is necessary for him to new assign. See *post*, "*New Assignment.*"

The court will not stay an action because the defendant has obtained protection for person and property from the Court of Bankruptcy. (*Naylor* v. *Mortimore*, 10 C. B. N. S. 566.)

(*a*) This is a good plea to a debt contracted within the jurisdiction of the foreign court, but not to a debt contracted in another country (*Smith* v. *Buchanan*, 1 East, 6; *Lewis* v. *Owen*, 4 B. & Ald. 654; and see the cases cited above); except, perhaps, where the plaintiff has taken the benefit of the foreign proceedings in bankruptcy. (*Phillips* v. *Allan*, 8 B. & C. 477.)

Plea of the Defendant's Bankruptcy pending Action under the 24 & 25 *Vict. c.* 134 (*a*).

That after the accruing of the plaintiff's claim, and after the passing of "The Bankruptcy Act, 1861," the defendant committed an act of bankruptcy, and became bankrupt within the meaning of the statutes in force concerning bankrupts; and thereupon a petition for adjudication of bankruptcy was duly filed against the defendant in the Court of Bankruptcy for the —— district, according to the said statutes; and such proceedings were had in the matter of the said petition, that the defendant was by the said court duly adjudged bankrupt; and all things having happened and been done, and all times having elapsed, necessary to entitle the defendant to the order of discharge hereinafter mentioned, the said court afterwards, and after the commencement of this suit, duly allowed and granted to the defendant an order of discharge, whereby the defendant was discharged from the said claim of the plaintiff; and the said order of discharge is still in full force and effect. [*If the order of discharge is not obtained until after plea pleaded, the above plea may be pleaded* puis darrein continuance. See *ante*, p. 387.]

Replication to a plea setting up a certificate in bankruptcy, that the certificate was obtained by fraud: Horn v. *Ion*, 4 B. & Ad. 78.

Plea of the Bankruptcy of the Plaintiff, under the 12 *&* 13 *Vict. c.* 106, *or the* 24 *&* 25 *Vict. c.* 134 (*b*).

That after the accruing of the plaintiff's claim the plaintiff, being a trader and subject to the statutes in force concerning bankrupts, committed an act of bankruptcy, and became bankrupt within the meaning of the said statutes; [*or if under the Bankruptcy Act*, 1861, *say*, That after the accruing of the plaintiff's claim, and after the passing of "The Bankruptcy Act, 1861," the plaintiff committed an act of bankruptcy and became bankrupt within the meaning of the statutes in force concerning bankrupts;] and thereupon a

(*a*) The general form of plea of the defendant's bankruptcy is given only in actions brought against the bankrupt after he obtained his order of discharge. The order, however, discharges the bankrupt from all debts and claims proveable under the bankruptcy. If the action is commenced before the order of discharge is obtained, the order, when obtained, may be pleaded as above; or if after plea pleaded, it must be pleaded *puis darrein continuance*. (See *ante*, p. 387, and see *Todd* v. *Mayfield*, 6 B. & C. 105.)

(*b*) The bankruptcy of a sole plaintiff is an issuable plea (*Willis* v. *Hallett*, 5 Bing. N. C. 465), but not the bankruptcy of one of two plaintiffs. (*Staples* v. *Holdsworth*, 4 Bing. N. C. 144.)

Where the bankruptcy of the plaintiff occurs subsequently to the commencement of the action, it can only be pleaded as a defence subject to the provisions of the Common Law Procedure Act, 1852, s. 142, giving the assignees the choice of continuing the action commenced by the plaintiff. By that section it is enacted that "The bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until

petition for adjudication of bankruptcy was duly filed against him in the court of bankruptcy for the —— district, according to the said statutes, and such proceedings were thereupon had in the matter of the said petition, that afterwards and the plaintiff was by the said court duly adjudged bankrupt, and one of the official assignees of the said court was then duly appointed by the said court to be and became an assignee of the estate and effects of the plaintiff under his said bankruptcy, and all things necessary in that behalf having happened and been done, the said debts and causes of action thereupon became and were vested in the said assignee.

A like plea: Houghton v. *Kœnig*, 25 L. J. C. P. 218; 18 C. B. 235.

Plea to an action by husband and wife, of the bankruptcy of the husband and vesting of his right to sue in the assignees: Richbell v. *Alexander*, 30 L. J. C. P. 268; 10 C. B. N. S. 324.

Plea of the Bankruptcy of the Plaintiff under a Judgment Debtor Summons (24 *&* 25 *Vict. c.* 134, *s.* 83).

That after the accruing of the plaintiff's claim, and after the passing of "The Bankruptcy Act, 1861," one *G. H.*, being a judgment-creditor of the plaintiff, and entitled to sue out against him a writ of *capias ad satisfaciendum*, and to charge him in execution, in respect of a debt amounting to fifty pounds, exclusive of costs, duly and according to the provisions of the said Act, sued out of the Court of Bankruptcy for the district of ——, being the district in which the plaintiff then lived, a judgment-debtor summons against the plaintiff, requiring the plaintiff to appear in the said court, and be examined respecting his ability to satisfy the said debt, which said summons was afterwards duly served personally on the plaintiff; and after the said service of the said summons the plaintiff did not pay the said debt, or secure or compound for the same to the satisfaction of the said *G. H.* [*or as the case may be*]; and thereupon, all proceedings having been had, and all things having happened and been done, and all times having elapsed necessary in that behalf according to the provisions of the said Act, the said court duly adjudged the plaintiff bankrupt; and one of the official assignees of the said court was then duly appointed by the said court to be and became an assignee of the estate and effects of the plaintiff under his said bankruptcy; and all things necessary in that behalf having

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such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may within eight days after such neglect or refusal, plead the bankruptcy." This section contemplates the bankruptcy or insolvency of the plaintiff after action brought and does not apply to the previous defence of the bankruptcy of the plaintiff before the commencement of the action. (*Stanton* v. *Collier*, 3 E. & B. 274.)

The plea of the bankruptcy of the plaintiff after action will be in the same terms with that above given for the bankruptcy of the plaintiff before action, with this addition, that it must be pleaded to the further maintenance of the action. If the bankruptcy has occurred after the defendant has already pleaded in the action, it must be pleaded *puis darrein continuance*. (See *ante*, p. 387.)

happened and been done, the said debts and causes of action thereupon became and were vested in the said assignee.

Plea that the debt accrued after the bankruptcy of the plaintiff, and before certificate, and was claimed by his assignees: Herbert v. *Sayer*, 5 Q. B. 965.

Plea of Release by Deed of Arrangement under 24 *&* 25 *Vict. c.* 134, *s.* 192 (*a*).

That after the accruing of the plaintiff's claim, and after the eleventh day of October, A. D. 1861, the defendant was indebted to

(*a*) Under the Bankrupt Law Consolidation Act, 1849, there were three modes of arrangement with creditors:—an arrangement under the control of the court, followed by a certificate under ss. 211–223; an arrangement by deed under ss. 224–229; and a composition after adjudication under ss. 230, 231; and these operated respectively to discharge the bankrupt from all actions, by the certificate, or by the release in the deed, if it contained one, or by payment of the composition. Pleas setting up these defences are referred to *post*, p. 443, and will be applicable to any cases which may still arise under the Bankrupt Law Consolidation Act, 1849; but the sections of that Act which relate to arrangements with creditors are repealed by the Bankruptcy Act, 1861, and replaced by one mode of arrangement by agreement.

By the Bankruptcy Act, 1861, s. 192, "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed; that is to say:—

"1. A majority in number, representing three-fourths in value, of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument:

"2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same:

"3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

"4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor the same shall be produced and left (having been first duly stamped) at the office of the chief registrar for the purpose of being registered:

"5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to ten pounds or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:

"6. Such deed or instrument shall, before registration, bear such ordinary and *ad valorem* stamp duties as are hereinafter provided:

"7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

The language of this section describing the contents of the deed is nearly

the plaintiff and divers other persons, and thereupon a deed bearing date the —— day of ——, A. D. ——, was made and entered into by and between the defendant of the first part, and *J. K.* and *L. M.*, as and being trustees on behalf of all the creditors of the defendant of the second part, and the several persons being creditors of the defendant who should execute the same of the third part, relating to the debts and liabilities of the defendant, and his release therefrom [*or* the distribution, inspection, management, and winding-up of his estate, *or some of such matters, as the case may be*], and the defendant thereby conveyed and assigned all his estate and effects to the said trustees, absolutely to be applied and administered [*or* upon trust *according to the deed*] for the benefit of all the creditors

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the same as that of the Bankrupt Law Consolidation Act, 1849, s. 224; and it was held under that statute that the deed must provide for the distribution of *all* the debtor's estate amongst *all* his creditors (*Drew* v. *Collins*, 6 Ex. 670; *Fisher* v. *Bell*, 12 C. B. 363; *Tetley* v. *Taylor*, 1 E. & B. 529; *Bloomer* v. *Darke*, 2 C. B. N. S. 165); and accordingly a deed of arrangement which provided for the distribution of all the debtor's estate, which would have vested in his assignees if he had become a bankrupt, was held void, because a bankrupt may retain necessary articles of wearing apparel, and, therefore, the deed did not include all his estate. (*Snodin* v. *Boyce*, 4 H. & N. 391.) The same construction has been given to the above section of the new Act. (*Cruger* v. *Dunlop*, 10 W. R. Ex. C. 801; and see *Oppenheimer* v. *Grieves*, 10 W. R. Ex. 541; *Walter* v. *Adcock*, 10 W. R. Ex. 542.)

The effect of the arrangement as regards the liabilities of the bankrupt is provided for by section 198, which enacts that, "After notice of the filing and registration of such deed has been given as aforesaid (see s. 193), no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant, as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar, and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy."

Although this section gives protection to the bankrupt against execution, or process against his property or person, it leaves him still liable to an action. His liability to an action, therefore, is not affected by the arrangement, otherwise than according to the terms of the deed. If the deed does not contain a release or amount to a bar of the rights of action of the creditors against the bankrupt, it will give no defence to an action by a creditor; but if the deed contains in its terms a release or bar, the deed being valid and binding on all the creditors as if they were parties to and had duly executed the same, it may be pleaded in answer to an action brought by any of them against the bankrupt.

The plea must sufficiently show the validity of the deed, and must state the contents as constituting a release. (See *Tabor* v. *Edwards*, 27 L. J. C. P. 183; 4 C. B. N. S. 1; *Legg* v. *Cheeseborough*, 5 C. B. N. S. 741.) A general averment "that all things were done and happened according to the said Act to make the said deed and the release therein contained effectual upon the creditors," etc., was held insufficient to import the averment that the deed distributed all the effects amongst all the creditors. (*Bloomer* v. *Darke*, 2 C. B. N. S. 165; and see *Irving* v. *Gray*, 3 H. & N. 34.) A general averment that "all things were performed and done as required by the said statute to make the said memorandum of arrangement an obligatory instrument upon all the creditors of the defendant," was held insufficient to import that the deed contained a release. (*Tabor* v. *Edwards*, 4 C. B. N. S. 1.)

of the defendant in manner therein mentioned; and the said persons, parties thereto of the third part, thereby severally and respectively released and discharged the defendant from all debts and liabilities of the defendant to the said creditors respectively, and from all actions and suits in respect thereof [*stating the release or other bar to the action shown by the deed, as the case may be*], and a majority in number, representing three-fourths in value, of the creditors of the defendant whose debts respectively amounted to ten pounds and upwards, did in writing assent to and approve of the said deed; and the said trustees appointed by the said deed executed the same; and the execution of the said deed by the defendant was attested by an attorney [*or* solicitor], and within twenty-eight days from the day of the execution of the said deed by the defendant, the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered; and together with such deed there was delivered to the said chief registrar an affidavit by the defendant [*or* some person able to depose thereto, *or* a certificate by the said trustees] that a majority in number, representing three-fourths in value, of the creditors of the defendant whose debts amounted to ten pounds and upwards, had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendant comprised in the said deed; and the said deed did before the registration thereof bear such ordinary and *ad valorem* stamp duties as were provided by the Bankruptcy Act, 1861, in that behalf; and immediately on the execution of the said deed by the defendant, possession of all the property comprised therein, of which the defendant could give or order possession, was given to the said trustees; and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to within the meaning of the Bankruptcy Act, 1861; and all conditions having been performed, and all things having happened necessary in that behalf, the defendant became and was and is bound by the said deed as if he had been a party thereto, and had duly executed the same.

Plea of an arrangement under the control of the court, and certificate under the Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c.* 106, *ss.* 211–223: *Alcard* v. *Messon*, 7 Ex. 753; 8 Ex. 260; *Tindall* v. *Hibberd*, 26 L. J. C. P. 173; 2 C. B. N. S. 199.

Pleas of release by deed of arrangement, under the Bankrupt Law Consolidation Act, 1849, *ss.* 224–229: *Phillips* v. *Surridge*, 1 L. M. & P. 458; 19 L. J. C. P. 337; *Stewart* v. *Collins*, 2 L. M. & P. 61; *Drew* v. *Collins*, 6 Ex. 670; *Tetley* v. *Taylor*, 1 E. & B. 521; *Cooper* v. *Thornton*, 1 E. & B. 544; *Fisher* v. *Bell*, 12 C. B. 363; *March* v. *Warwick*, 25 L. J. Ex. 334; 1 H. & N. 158; *Macnaught* v. *Russell*, 26 L. J. Ex. 192; 1 H. & N. 611; *Bloomer* v. *Darke*, 26 L. J. C. P. 214; 2 C. B. N. S. 165; *Tabor* v. *Edwards*, 27 L. J. C. P. 183; *Irving* v. *Gray*, 27 L. J. Ex. 273; 3 H. & N. 34; *Leonard* v. *Sheard*, 28 L. J. Q. B. 183; 1 E. & E. 667; *Legg* v. *Cheesebrough*, 28 L. J. C. P. 209; *Snodin* v. *Boyce*, 28 L. J. Ex. 245; 4 H. & N. 391; *Gardner* v. *Chapman*, 8 C. B. N. S. 317.

Plea of a composition after adjudication, under the Bankrupt Law Consolidation Act, 1849, *ss.* 230, 231: *Taylor* v. *Pearse*, 26 L. J. Ex. 371; 2 H. & N. 36; *Hazard* v. *Mare*, 30 L. J. Ex. 97; 6 H. & N. 434.

Plea of Illegality, under 24 *&* 25 *Vict. c.* 134, *ss.* 164, 166 (*a*).

That he [*or J. K.*], after the eleventh day of October, A.D. 1861, became bankrupt within the meaning of the statutes in force concerning bankrupts, and the causes of action in the declaration mentioned accrued pending proceedings in bankruptcy against the defendant [*or* the said *J. K.*].

Special plea to an action on a bill, that it was given by the defendant, a bankrupt, to induce the plaintiff, a creditor, to forbear opposing his certificate, under the Bankrupt Law Consolidation Act, 1849, *s.* 202: *Goldsmid* v. *Hampton*, 27 L. J. C. P. 286.

To an action on a bond, that it was given by the defendant, a bankrupt, for a debt barred by his certificate, under the Bankrupt Law Consolidation Act, 1849, *s.* 204: *Kidson* v. *Turner*, 3 H. & N. 581; 27 L. J. Ex. 492.

Plea to an action on a bill, that it was accepted by the defendant,

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(*a*) By the Bankruptcy Act, 1861, s. 164, it is enacted that "After the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim or demand proveable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise or agreement, he may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence."

By s. 166, it is enacted that "Any contract, covenant, or security made or given by a bankrupt or other person, with, to, or in trust for any creditor, for securing the payment of any money as a consideration or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a rehearing of or to appeal against the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this Act and the special matter in evidence: Provided always that no such security, if a negotiable security, shall be void as against a *bonâ fide* holder thereof for value without notice of the consideration for which it was given." Such a negotiable security was previously void absolutely, under the 12 & 13 Vict. c. 106, s. 202, and even a *bonâ fide* holder for value could not recover upon it. (*Goldsmid* v. *Hampton*, 27 L. J. C. P. 286; 5 C. B. N. S. 94.)

These sections are similar to the 204th and 202nd sections of the Bankrupt Law Consolidation Act of 1849, in their subject-matter, but they differ in prescribing a new mode of pleading the defences thereby given. Under the corresponding sections of that Act the defendant may plead *the general issue*, and give the Act and the special matter in evidence; and *non assumpsit* by statute may thus be pleaded even to actions on bills of exchange and promissory notes. (*Weeks* v. *Argent*, 16 M. & W. 817; *Goldsmid* v. *Hampton*, 27 L. J. C. P. 286; 5 C. B. N. S. 94.)

a bankrupt, upon consideration that the plaintiff, the petitioning creditor, should abandon the proceedings in bankruptcy: Davis v. *Holding*, 1 M. & W. 159.

Plea to an action on a promissory note that it was given by the defendant to a creditor of an insolvent, in order to induce him to forbear from opposing the insolvent's petition; and that it was indorsed to the plaintiff with notice: Hills v. *Mitson*, 8 Ex. 751.

Pleas in actions by assignees of bankrupts: see ante, p. 426.

Replication to a Plea of the Plaintiff's Bankruptcy, that the Plaintiff assigned the Debt before Bankruptcy, with Notice to the Defendant, and now sues as Trustee.

That before the plaintiff became bankrupt, he [by deed] assigned to *J. K.*, for a good and valuable consideration, the said debts and causes of action [and appointed the said *J. K.*, his attorney, to sue for and recover the same], whereof the defendant then had notice; and this action was commenced and is prosecuted in the name of the plaintiff as a trustee for the said *J. K.* at his request, and for his sole use and benefit, and not otherwise.

A like replication: Monk v. *Sharp*, 2 H. & N. 540.

A like replication of assignment before insolvency: Buck v. *Lee*, 1 A. & E. 804; *and see Carvalho* v. *Burn*, 4 B. & Ad. 382; 1 A. & E. 883; *Tibbits* v. *George*, 5 A. & E. 115; *ante, p.* 427.

Replication to a plea of the bankruptcy of one of two joint plaintiffs, that he assigned the debt to the other plaintiff before bankruptcy, and joined in suing as trustee only: Dean v. *James*, 1 A. & E. 809.

Replication of a conditional assignment of the debt, which became subsequently absolute: D'Arnay v. *Chesneau*, 13 M. & W. 796.

Replication, in an action on a policy of insurance on goods, that the plaintiff before bankruptcy had assigned the goods and the policy, and sued only as trustee: Castelli v. *Boddington*, 1 E. & B. 66, 879.

Replication, in an action on a bond, that the plaintiff had assigned the bond as security for a larger debt, and sued for the benefit of the assignees of the bond: Dangerfield v *Thomas*, 9 A. & E. 292.

Replication, in an action by husband and wife to plea of husband's bankruptcy, that before marriage the debt sued for was assigned to trustees for the separate use of the wife, and that the plaintiff sued in order to recover the money for the trustees: Parnham v. *Hurst*, 8 M. & W. 743.

Replication that the plaintiff had previously by deed assigned the debt to a trustee for the benefit of his creditors, and sued only for the benefit of the trustee: Smith v. *Keating*, 6 C. B. 136.

Replication that the plaintiff sued for the rent of a house as trustee, and had no beneficial interest: Houghton v. *Kœnig*, 25 L. J. C. P. 218; 18 C. B. 235.

BILLS OF EXCHANGE, PROMISSORY NOTES, ETC. (*a*).

Traverse of the Drawing of the Bill (*b*).

That he did not draw the said bill as alleged.

Traverse of the Making of the Note (*c*).

That he did not make the said note as alleged.

(*a*) By r. 7, T. T. 1853, "in all actions upon bills of exchange and promissory notes, the plea of '*non assumpsit*' and '*never indebted*' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note."

The operation of this rule is confined to counts framed on the bills or notes only. Where the bill or note is introduced as a consideration for another contract, or as a fact which, in connection with other matter, produces the cause of action, the general issue may be applicable. Thus, where an executor sued upon a promise made to himself to pay a bill due to his testator, *non assumpsit* was held to be a proper plea. (*Timmis* v. *Platt*, 2 M. & W. 720; *Rolleston* v. *Dixon*, 2 D. & L. 892.) And *non assumpsit*, by statute, may be pleaded to a bill or note where it is a defence under s. 202, or 204 of the Bankrupt L. C. Act, 1849. (*Weeks* v. *Argent*, 16 M. & W. 817; *Goldsmid* v. *Hampton*, 27 L. J. C. P. 286; 5 C. B. N. S. 94.) See now the general form of plea given under the corresponding sections of the "Bankruptcy Act, 1861," *ante*, p. 444.

Where counts on bills or notes are joined in the declaration with other counts, the general issue, when pleaded, must be limited to the latter only, and not applied to the whole declaration. (*Donaldson* v. *Thompson*, 6 M. & W. 316; *Hughes* v. *Pool*, 6 M. & G. 271; and see *Harvey* v. *Hamilton*, 4 Ex. 43.) If the general issue only is pleaded to the count on a bill or note, the plaintiff may sign judgment. (*Kelly* v. *Villesbois*, 3 Jur. 1172.) And if it is pleaded to that count and others, he should enter a *nolle prosequi* as to the others. (*Fraser* v. *Newton*, 8 Dowl. 173; *Eddison* v. *Pigram*, 16 M. & W. 137.) If *never indebted* is pleaded to a count on a bill or note, and the plaintiff joins issue instead of objecting, it would seem that the defendant may avail himself of any defence applicable to the extended issue. (*Finleyson* v. *Mackenzie*, 3 Bing. N. C. 824; but see *Neale* v. *Proctor*, 2 C. & K. 456.) Perhaps *non assumpsit*, under such circumstances, might now be treated as an informal traverse of the acceptance or indorsement, etc.

Where the legal effect of a bill or note is disputed, it may sometimes be convenient to set it out verbatim in the plea, leaving the plaintiff to demur. (See *Yates* v. *Nash*, 29 L. J. C. P. 306.)

A defendant who has obtained leave to appear and defend under the Summary Procedure on Bills of Exchange Act (see *ante*, p. 75), is not restricted in his defence to the matter disclosed in the affidavit. (*Saul* v. *Jones*, 28 L. J. Q. B. 37; 1 E. & E. 59.)

(*b*) This plea may be used by the drawer of a bill payable to a third person. An acceptor or indorser cannot traverse the drawing of the bill; so also an indorser is estopped from traversing any previous indorsement. Such traverses may be met by demurrer, as the acceptance or indorsement which creates the estoppel is necessarily admitted on the face of the declaration by the traverse. (*Sanderson* v. *Collman*, 4 M. & G. 209, 225; *Beeman* v. *Duck*, 11 M. & W. 251; *Armani* v. *Castrique*, 13 M. & W. 443; *Macgregor* v. *Rhodes*, 25 L. J. Q. B. 318; 6 E. & B. 266.)

(*c*) An indorser is estopped from denying the making of the note or any previous indorsement. (See the preceding note.)

Traverse of the Acceptance (*a*).

That he did not accept the said bill as alleged.

Traverse of the Indorsement (*b*).

That he [*or* the said *G. H.*] did not indorse the said bill [*or* note] as alleged.

Traverse of the Presentment for Acceptance (*c*).

That the said bill was not duly presented for acceptance as alleged.

(*a*) Under the traverse of the accepting of the bill or making of the note, the plaintiff is bound to prove a bill or note agreeing with that stated in his declaration; so that whenever the defence is that the bill or note actually accepted or made differs from that declared upon, such a traverse is the proper plea, and a special plea would be incorrect. (*Crotty* v. *Hodges*, 4 M. & G. 561; *Flight* v. *Maclean*, 16 M. & W. 51; and see *post*, p. 456.) The plaintiff is bound to prove the acceptance of a bill which is overdue at the time of action brought. (*Hinton* v. *Duff*, 31 L. J. C. P. 199.) Under this traverse the defendant may give any evidence tending to disprove the fact that the bill was accepted, or the note made by him or by his authority; as that it was a forgery (*Griffiths* v. *Payne*, 11 A. & E. 131); that the bill was, to the knowledge of the plaintiff accepted by his partner in fraud of the partnership (*Grout* v. *Enthoven*, 1 Ex. 382; *Musgrave* v. *Drake*, 5 Q. B. 185), or in respect of a debt not connected with the partnership (*Wilson* v. *Lewis*, 2 M. & G. 197).

The defendant may also take advantage of any objection to the stamp, because the bill or note thereby becomes inadmissible in evidence. (*Dawson* v. *Macdonald*, 2 M. & W. 26; *Field* v. *Wood*, 7 A. & E. 114.) The defence that an accommodation bill has been paid by the drawer, and reissued by him without a fresh stamp, may be pleaded specially, as amounting to a plea of illegality. (*Lazarus* v. *Cowie*, 3 Q. B. 459.)

(*b*) An indorser cannot traverse the drawing or making, or any previous indorsement of the bill or note; such a plea would be demurrable. (See *ante*, p. 446, *n.* (*b*).) As to the meaning of the term indorsement, see *Marston* v. *Allen*, 8 M. & W. 494; *Harrop* v. *Fisher*, 10 C. B. N. S. 196; 30 L. J. C. P. 283; and see *ante*, p. 80 *n.* (*a*). The traverse of the indorsement of the bill or note puts in issue the transfer by indorsement, and involves, not only the fact of the *signature* on the back of the bill or note by the indorser or under his authority, but also the *delivery* for the purpose of transfer. (*Brind* v. *Hampshire*, 1 M. & W. 371; *Cunliffe* v. *Whitehead*, 3 Bing. N. C. 828.) And any matter disproving these facts may be given in evidence under this issue without being specially pleaded. (*Adams* v. *Jones*, 12 A. & E. 455; *Hallifax* v. *Lyle*, 3 Ex. 446; *Steele* v. *Harmer*, 14 M. & W. 831; *Bell* v. *Ingestre*, 19 L. J. Q. B. 71; *Law* v. *Parnell*, 29 L. J. C. P. 17.)

It has been held that the defence that the defendant was drunk when he made the indorsement must be specially pleaded. (*Gore* v. *Gibson*, 13 M. & W. 623; and see *post*, p. 484.) And in an action against the drawer the plea that the indorser was insane has been allowed to be pleaded. (*Alcock* v. *Alcock*, 3 M. & G. 268; and see *post*, "*Insanity*.")

(*c*) As to the presentment for acceptance, see *ante*, p. 80 (*b*).

Traverse of the Presentment for Payment (*a*).

That the said bill was not duly presented for payment as alleged.

Traverse of the Default in Acceptance.

That the said *G. H.* accepted the said bill when the same was presented for acceptance as alleged [*or* that the said bill was not dishonoured as alleged].

Traverse that the Bill was returned to the Plaintiff.

That the said bill was not returned to the plaintiff as alleged.

Traverse of Notice of Dishonour (*b*).

That he had not due notice of the dishonour of the said bill as alleged.

Plea of a former presentment for acceptance and dishonour, of which the defendant had not notice: Bartlett v. *Benson*, 14 M. & W. 733; *and see ante, p.* 80, *n.* (*b*).

Traverse of the Facts alleged as Excuse for Want of Notice of Dishonour [*or of Presentment*].

That at the time when the said bill became due and payable the said *G. H.* had effects of the defendant to the amount of the said bill [*or* there was consideration and value for the payment by the said *G. H.* of the said bill, *or as the case may be*].

(*a*) As to presentment for payment, see *ante*, p. 81 (*b*). Where a bill accepted payable at the plaintiffs' bank came by indorsement to the plaintiffs, who held no assets of the acceptor when the bill became due, it was held that the plaintiffs were entitled to recover on this issue. (*Bailey* v. *Porter*, 14 M. & W. 44.) On a general acceptance, presentment is not necessary to charge the acceptor. As to the effect of this traverse in actions against the acceptor and against the drawer on bills drawn or accepted payable at a particular place, see *ante*, pp. 78 (*b*), 81 (*b*). As to the issue raised by this plea in actions upon checks, see *ante*, p. 89 (*c*).

(*b*) As to the effect of this plea, and what is due notice of dishonour, see *ante*, pp. 80 (*b*), 81 (*c*).

No precise form of words is necessary in giving notice of dishonour; a notice is sufficient if it can be reasonably inferred therefrom that the bill has been presented and has been dishonoured, as a letter to the indorser of a note informing him that it had been returned unpaid, and requesting payment (*Hedger* v. *Steavenson*, 2 M. & W. 799); so a letter to the indorser of a bill informing him that the acceptance was unpaid, and requesting his immediate attention to it. (*Bailey* v. *Porter*, 14 M. & W. 44; *Paul* v. *Joel*, 28 L. J. Ex. 143; 4 H. & N. 355.) But a letter to the indorser of a bill, threatening legal measures for the recovery, unless immediately paid, was held not to amount to a good notice of dishonour. (*Solarte* v. *Palmer*, 1 Bing. N. C. 194.) Matters of excuse of notice will not support the issue, but should be averred in the declaration according to the fact. (*Ante*, pp. 80 (*a*), 81; *Allen* v. *Edmundson*, 2 Ex. 719; and see as to notice of dishonour, "Byles on Bills," 8th ed. 252, 282.)

Traverse of Facts alleged as Excuse for Want of Presentment.

That the plaintiff did not make diligent search and inquiry for the said *G. H.* [*or as the case may be*] as alleged.

Denial that the Defendant dispensed with Presentment.

That he did not request the plaintiff not to present the said bill to the said *G. H.* for payment, nor discharge the plaintiff from so presenting it, as alleged.

Plea that the Plaintiff was not the Holder (*a*).

That the plaintiff was not at the commencement of this suit the lawful holder of the said bill [*or* bearer of the said check].

A like plea: Emmett v. *Tottenham*, 8 Ex. 884; *Ancona* v. *Marks*, 31 L. J. Ex. 163.

Plea that the Plaintiff has indorsed away the Bill (*b*).

That after the said bill was indorsed to the plaintiff he indorsed it [*add*, the same being payable to order and transferable by indorsement, *if this does not appear on the declaration*] to *O. P.* [*or* to a person to the defendant unknown], who thenceforth has been and still is the holder thereof.

Like pleas: Fraser v. *Welsh*, 8 M. & W. 629; *Basan* v. *Arnold*, 6 M. & W. 559; *Schild* v. *Kilpin*, 8 M. & W. 673.

Plea in an action by the indorsee against the acceptor of a bill, that the drawer became bankrupt and indorsed it after bankruptcy: Mackay v. *Wood*, 7 M. & W. 420; *Braithwaite* v. *Gardiner*, 8 Q. B. 473.

Plea by the maker of a note that the payee became bankrupt before he indorsed it to the plaintiff: Green v. *Steer*, 1 Q. B. 707.

Plea that the Defendant accepted the Bill for the Plaintiff's Accommodation (*c*).

That he accepted the said bill for the accommodation of the plain-

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(*a*) The *holder* is a general term applied to the party in possession of the bill, and entitled at law to receive its contents from another. (Byles on Bills, 8th ed. p. 2; and see *Jenkins* v. *Tongue*, 29 L. J. Ex. 147; *Ancona* v. *Marks*, 31 L. J. Ex. 163.) The above plea is applicable in cases of bills, etc., payable to bearer. In other cases its meaning and effect are ambiguous; and although it has been not unfrequently used of late, leave to plead it with other pleas is sometimes refused, and in some instances particulars have been ordered to be given of the defences intended to be relied upon under it.

(*b*) The substance of an issue taken upon this plea is, whether the plaintiff was the holder at the time of action brought. (*Fraser* v. *Welsh*, 8 M. & W. 629; *Basan* v. *Arnold*, 6 M. & W. 559; *Schild* v. *Kilpin*, 8 M. & W. 673; *Talbot* v. *Bulkeley*, 4 D. & L. 306.)

(*c*) By r. 8, T. T. 1853, drawing, indorsing, accepting, etc., bills or notes, by way of accommodation, must be specially pleaded.

Want of consideration is a good defence to an action on the bill between

tiff, and there never was any value or consideration for the acceptance or payment of the said bill by the defendant.

Plea that a note was made for the accommodation of the payee: King v. *Phillips*, 12 M. & W. 705.

Like pleas in actions by indorsees: Easton v. *Pratchett*, 1 C. M. & R. 798; *Thompson* v. *Clubley*, 1 M. & W. 212.

Plea that the Bill was accepted by the Defendant for the accommodation of the Drawer, who indorsed it to the Plaintiff without value (*a*).

That he accepted the said bill for the accommodation of the said *G. H.*, and there never was any value or consideration for the acceptance or payment of the said bill by the defendant; and the same was indorsed to the plaintiff, and he always held the same without any value or consideration.

Like pleas: Mills v. *Barber*, 1 M. & W. 425; *Parr* v. *Jewell*, 16 C. B. 684; *Basan* v. *Arnold*, 6 M. & W. 559.

A like plea, in an action by a second indorsee: Arbouin v. *Anderson*, 1 Q. B. 498.

Other Pleas of Want of Consideration.

Plea that the note sued on was given by the defendant in renewal of a bill of exchange on which he was not liable in consequence of an alteration: Bell v. *Gardiner*, 4 M. & G. 11.

Plea that an acceptance was given in renewal of a bill purporting to be accepted by the defendant, which was afterwards discovered to be a forgery (held a bad plea): Mather v. *Lord Maidstone*, 25 L. J. C. P. 310; 18 C. B. 273.

Plea that a note was made for a supposed balance of account, on condition that payment should not be demanded unless such balance was due, which it was not: Kearns v. *Durell*, 6 C. B. 596.

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immediate parties, and also between remote parties where the bill has passed without consideration through the intermediate parties; but the want of consideration at each step must be stated in the plea, and must be proved if denied. (*French* v. *Archer*, 3 Dowl. 130; *Reynolds* v. *Ivemey*, 3 Dowl. 453; *Low* v. *Chifney*, 1 Bing. N. C. 267; *Whitaker* v. *Edmunds*, 1 A. & E. 638; *Hunter* v. *Wilson*, 4 Ex. 489.) Pleas founded on want of consideration should set forth the facts from which the want of consideration appears, as that the bill was an accommodation bill, etc.; without which particularity they were formerly bad on special demurrer, though sufficient after verdict. (*Mills* v. *Oddy*, 2 C. M. & R. 103; *Stoughton* v. *Earl Kilmorey*, 2 C. M. & R. 72; *Stephens* v. *Underwood*, 4 Bing. N. C. 655; *Atkinson* v. *Davies*, 11 M. & W. 236.) And besides showing the circumstances, they must distinctly allege that there was no other consideration. (*Boden* v. *Wright*, 12 C. B. 445.) Since the abolition of special demurrers by the C. L. P. Act, 1852, it may perhaps be held sufficient to plead that there was no consideration simply, without stating the circumstances.

(*a*) A plea that the acceptance was an accommodation acceptance and that the bill was indorsed to the plaintiff when overdue, and with notice of its being an accommodation bill, is a bad plea. (*Charles* v. *Marsden*, 1 Taunt. 224; *Stein* v. *Yglesias*, 1 C. M. & R. 565; *Sturtevant* v. *Ford*, 4 M. & G. 101.) So likewise is a plea that a bill was accepted as an accommodation bill on the terms that it should be negotiated before it became due only, and not afterwards, and that it was indorsed to the plaintiff when overdue (*Carruthers* v. *West*, 11 Q. B. 143.)

Plea that a note was given by the defendant to the plaintiff upon a representation by the latter, that a sum of money was due from the defendant to him and in payment of such sum, whereas no such sum was due: Forman v. *Wright*, 11 C. B. 481; *Southall* v. *Rigg*, Ib.; *and see Wilks* v. *Hornby*, 10 W. R. Ex. 742.

Plea that the Bill was accepted in Payment of Goods sold, which the Plaintiff failed to deliver (a).

That the said bill was accepted by the defendant for the price of goods, to be sold and delivered by the plaintiff to the defendant before the said bill should become due, and the defendant was always ready and willing to buy and accept the said goods from the plaintiff, yet the plaintiff has not sold and delivered the same or any of them to the defendant; and except as aforesaid, there never was any value or consideration for the acceptance or payment of the said bill by the defendant.

Plea that the Bill was Accepted in Consideration of Goods to be Consigned by the Plaintiff to the Defendant for Sale to meet the Bill which the Plaintiff failed to Consign.

That the said bill was accepted by the defendant in consideration that the plaintiff would within a reasonable time in that behalf, and before the said bill should become due, cause to be consigned and delivered to the defendant certain goods to be sold by him as a broker of and for the plaintiff for reward to the defendant, and upon the terms that the defendant should be at liberty to meet and pay the said bill at maturity out of the proceeds of the sale of the said goods; and the defendant was always ready and willing to receive and sell the said goods for the purpose and on the terms afore-

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(*a*) An entire failure of consideration is a good plea to an action on a bill or note. (*Solly* v. *Hinde*, 2 C. & M. 516; *Wells* v. *Hopkins*, 5 M. & W. 7; *Abbott* v. *Hendricks*, 1 M. & G. 791.) But a partial failure of consideration cannot be pleaded to the whole amount of the bill. (*Clark* v. *Lazarus*, 2 M. & G. 167; *Trickey* v. *Larne*, 6 M. & W. 278.) Nor can a failure of consideration to an unliquidated amount be pleaded even to a part. Where a bill or note is given for the price of goods, work, etc., the defendant cannot dispute the price, quantity, or quality of the goods, work, etc., in an action on the bill. (*Trickey* v. *Larne*, 6 M. & W. 278; *Sully* v. *Frean*, 10 Ex. 535.) Where a bill is given for the price of goods sold with a warranty, a breach of the warranty is no defence to an action on the bill, unless it amounts to a total failure of consideration. (*Warwick* v. *Nairn*, 10 Ex. 762; *Low* v. *Burrows*, 2 A. & E. 483; *Camac* v. *Warriner*, 1 C. B. 356; *Horsfall* v. *Thomas*, 31 L. J. Ex. 322.) Wherever upon a breach of warranty of goods sold, the purchaser would be entitled to recover back the price as money received to his use (see *ante*, "*Warranty*," p. 230 (*b*)), he might also defend an action upon a bill given for the price on the ground of entire failure of consideration.

Where the consideration can be severed into ascertained amounts of money, an entire failure of consideration as to a certain amount may be pleaded *pro tanto* to a portion of the bill. (*Darnell* v. *Williams*, 2 Stark. 166; *Forman* v. *Wright*, 11 C. B. 481.) And there may be different defences to different parts of the bill. (*Sheerman* v. *Thompson*, 11 A. & E. 1027, 1032.)

said, but the plaintiff did not within such reasonable time as aforesaid, or at any other time, cause to be consigned or delivered to the defendant the said goods or any of them; and except as aforesaid, there never was any value or consideration for the acceptance or payment of the said bill by the defendant.

Other Pleas of Failure of Consideration.

Plea that the bill was given for goods sold according to a certain sample, and that no goods were delivered answering the sample: Wells v. *Hopkins*, 5 M. & W. 7; *Warwick* v. *Nairn*, 10 Ex. 762.

That the bill was accepted for the price of a cow warranted sound, and that the cow was not sound, and died in consequence: Low v. *Burrows*, 2 A. & E. 483.

That the note was made in consideration of future services of the plaintiff which he never rendered: Abbott v. *Hendricks*, 1 M. & G. 791.

Plea that the bill was accepted in payment of some materials supplied as warranted fit for roofing, which proved unfit for that purpose: Camac v. *Warriner*, 1 C. B. 356.

Plea that the note was given to secure part of a debt due from a third party to the plaintiff, in consideration that the plaintiff would not enforce the residue, and that the plaintiff afterwards enforced the whole debt: Gillett v. *Whitmarsh*, 8 Q. B. 966.

That the note was given in consideration of the trouble the payee would have in being the maker's executor, and that the payee died in the lifetime of the maker: Solly v. *Hinde*, 2 C. & M. 516.

That the note was given as the purchase-money of land which the plaintiff refused to convey: Jones v. *Jones*, 6 M. & W. 84; *Moggridge* v. *Jones*, 14 East. 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155.

That the note was given in consideration of the plaintiff paying the defendant's creditors, which he failed to do: Cole v. *Cresswell*, 11 A. & E. 661.

That the note was given as security for advances to a third party which were repaid before the note became due: Richards v. *Macey*, 14 M. & W. 484.

That the bill was accepted in consideration of money agreed to be paid to the defendant by the plaintiff and a third party, and which was not paid: Astley v. *Johnston*, 29 L. J. Ex. 161.

Plea that the Defendant was induced to accept the Bill by the fraud of the Drawer, who indorsed it to the Plaintiff without Value [or with notice or when overdue] (a).

That he was induced to accept the said bill through the fraud of the said *G. H.*, and the same was indorsed to the plaintiff and he

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(a) In an action by the indorsee of a bill of exchange, the plea that the defendant was induced to draw or accept the bill by fraud must show that the plaintiff was a party to the fraud or took the bill without consideration, or with notice or when it was overdue. The title of a *bonâ fide* indorsee for value who took the bill before it became due and without notice is not affected either at law or in equity by any fraud in the inception of the bill.

always held the same without any value or consideration [*or*, and the plaintiff had notice thereof when the said bill was first indorsed to him, *or*, and the said bill was overdue when the same was first indorsed to the plaintiff].

Plea that the bill was drawn or accepted by a partner of the defendant in fraud of him, and was indorsed to the plaintiff with notice: Bramah v. *Roberts*, 1 Bing. N. C. 469; *Lewis* v. *Reilly*, 1 Q. B. 349.

Plea by the Acceptor that the Bill was accepted without any consideration and was delivered to the Drawer for the purpose of his getting it discounted for the Defendant's benefit, and that it was indorsed by the Drawer to the Plaintiff in fraud of that purpose and without Value.

That the said bill was accepted and delivered by the defendant to the said *G. H.* for the purpose only of his getting it discounted for the defendant, and there never was any value or consideration for the acceptance or payment of the said bill by the defendant; and the

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(*Robinson* v. *Reynolds*, 2 Q. B. 196; *Thiedemann* v. *Goldsmidt*, 8 W. R. C. 14.) And the rule is the same in the case of an illegal consideration.

Since the C. L. P. Act, 1852, the several allegations that the plaintiff took the bill without value and with notice and when overdue are sometimes added in one plea; but this is not allowed by some of the learned judges, and such a plea is objectionable, as the defendant would be entitled to a verdict and the costs of the issue, on proving so much of it as would amount to a defence, and the plea not being divisible, the plaintiff would not be entitled to the costs of the evidence which he may have come prepared with to rebut successfully the facts which the defendant abandons or fails in proving.

Where the title is traced through several indorsements, the plea must invalidate the title of each indorsee down to the plaintiff inclusive, by alleging that each took it without value, or with notice, or after it was due. This may lead to a great multiplicity of pleas where the indorsements are numerous, and in order to avoid this objection, three pleas only are sometimes used in practice, alleging in one that all the indorsements were without value, in another that all were with notice, and in the third that all were made when the bill was overdue. Such pleas give sufficient notice to the plaintiff that the several objections may be taken to each indorsement, and would facilitate the defendant's application (if necessary) at the trial to amend any one of the pleas according to the evidence.

The plea alleging that the plaintiff took the bill without value does not put in issue his knowledge of the fraud, but only calls upon him to prove that he is a holder for value. Notice of the fraud, if relied on, must be distinctly averred. (*Uther* v. *Rich*, 10 A. & E. 784.) As to the evidence necessary to support the averment of notice of the fraud, see the notes to *Miller* v. *Race*, 1 Smith, L. C. 5th ed. 450.

Upon evidence being given of fraud or illegality either in the inception of the bill, or in its original negotiation, or on proof that the bill has been stolen, the plaintiff is called upon to prove that he is a holder for value. (*Hall* v. *Featherstone*, 27 L. J. Ex. 308; *Berry* v. *Alderman*, 14 C. B. 95; 3 H. & N. 284; *Raphael* v. *Bank of England*, 17 C. B. 161; *Mather* v. *Lord Maidstone*, 26 L. J. C. P. 58; 1 C. B. N. S. 273.) The mere fact of the consideration for the bill being proved to be money lost on a wagering contract which is void under the 8 & 9 Vict. c. 109, but not illegal, does not throw upon the plaintiff the *onus* of proving that he gave value for it. (*Fitch* v. *Jones*, 5 E. & B. 238.)

said *G. H.* did not get the said bill discounted for the defendant, but in fraud of the defendant, and without his consent and contrary to the said purpose, indorsed the said bill to the plaintiff; and the plaintiff first took and always held the same without any value or consideration.

Like pleas: Berry v. *Alderman*, 14 C. B. 96; *Boden* v. *Wright*, 12 C. B. 445; *Law* v. *Parnell*, 29 L. J. C. P. 17.

A like plea alleging that the plaintiff took the bill when overdue: Lewis v. *Parker*, 4 A. & E. 838.

Plea by the Drawer that he drew and indorsed the Bill without any consideration, for the purpose of getting it discounted, and that it was negotiated in fraud of that purpose, and came to the Plaintiff without Value.

That he drew the said bill and indorsed it in blank, and delivered it so indorsed to *J. K.* for the purpose only of his getting it discounted for the defendant, and there never was any value or consideration for the drawing, indorsement, or payment of the said bill by the defendant; and the said *J. K.* did not get the said bill discounted for the defendant, but in fraud of the defendant and without his consent and contrary to the said purpose, delivered the said bill to a person to the defendant unknown, who afterwards delivered the same to the plaintiff, which is the alleged indorsement of the said bill by the defendant to the plaintiff; and the said transfers of the said bill were respectively made without any value or consideration, and the plaintiff always held the said bill without any value or consideration.

A like plea: Uther v. *Rich*, 10 A. & E. 784.

Like pleas alleging that the plaintiff took the bill with notice: Dobie v. *Larkan*, 10 Ex. 776; *Hall* v. *Featherstone*, 27 L. J. Ex. 308; 3 H. & N. 284.

Plea that the bill was delivered to a person to be safely kept on behalf of the defendant, and that the said person in violation of that purpose transferred it to the plaintiff, who had notice that he had no authority so to do: Bramah v. *Roberts*, 1 Bing. N. C. 469; *Leaf* v. *Robson*, 13 M. & W. 651.

Plea that the note was feloniously stolen from the owner, and that the plaintiff was not a holder for value and without notice: Raphael v. *Bank of England*, 17 C. B. 161.

That the defendant had cancelled the bill by tearing it, but the pieces had afterwards been fraudulently joined and the bill negotiated without value: Ingham v. *Primrose*, 28 L. J. C. P. 294; 7 C. B. N. S. 82.

Plea to a count on a Bill or Note, with a count on the consideration, and on accounts stated, showing Illegality, etc., in the consideration (*a*).

That the said goods [*or* work and materials, *or as the case may*

(*a*) A plea in the above form will be found useful whenever a declaration contains counts on a bill or note, and on the consideration for it, and on

be] were sold and delivered [*or* done and provided] for [*stating the defence to the consideration for the bill, see post, "Illegality," p.* 511], and the defendant accepted the said bill for and on account of the said goods [*or* work and materials, *or as the case may be*] and there never was any value or consideration for the acceptance or payment of the said bill except as aforesaid, and the said accounts stated were stated of and concerning the said goods [*or* work and materials, *or as the case may be*] and the said acceptance, and not otherwise.

Pleas of illegality to actions on bills or notes: see "Bankruptcy," p. 444, *"Gaming," p.* 503, *"Illegality," p.* 511.

Plea in an Action by the Indorsee against the Indorser of a Bill, that the Plaintiff and the Drawer are the same person (a).

That the said *A. B.*, the drawer and indorser of the said bill, and the plaintiff are one and the same person.

Like pleas: Wilders v. *Stevens*, 15 M. & W. 208; *Boulcott* v. *Woolcott*, 16 M. & W. 584; *Smith* v. *Marsack*, 6 C. B. 486.

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accounts stated; and a defence, such as illegality, which must be specially pleaded, extends to the whole of the alleged causes of action. In such a case, the special defence must be pleaded to each count either separately or jointly as above, which is the shorter and better form. If the facts constituting the special defence to the bill or note amount to never indebted to the indebitatus count, the proper course is to limit the special plea to the count on the bill or note only, and to plead the general issue to the residue. And if the special defence falls under a general form of plea, as fraud, payment, or release, it may be pleaded generally to the whole.

Where part of the consideration for a bill is illegal, the consideration is not severable. (*Scott* v. *Gillmore*, 3 Taunt. 226; *Hay* v. *Ayling*, 16 Q. B. 423.)

(*a*) If a bill be reindorsed to a previous indorser, the latter, in order to avoid a circuity of action, is not permitted to recover against the intermediate parties; for upon such recovery against them, they would have their remedy over against him, and the result would be to place the parties in precisely the same situation as before any action at all. (See Byles on Bills, 8th ed. p. 143, and the cases cited *supra*.)

On this ground a count on a promissory note payable to the plaintiff or order, stating an indorsement by him to the defendant, and a reindorsement by the defendant to the plaintiff, was held bad in arrest of judgment. (*Bishop* v. *Hayward*, 4 T. R. 470.) So a count on a bill of exchange drawn by the plaintiff, indorsed by him to the defendant and reindorsed to the plaintiff, would be bad. (*Boulcott* v. *Woolcott*, 16 M. & W. 584, 589.) But if in such cases as the above the count is drawn so as not to disclose the identity of the plaintiff and indorser, as where the indorser is described by name only, and not as "the plaintiff," it would be supported on the assumption that they are different persons (*ib.*); and a plea of identification would be necessary (see form, *supra*). If in such case there exist circumstances which alter the rights of the parties as they appear on the bill, and negative the right of the defendant to recover over against the plaintiff, the action will be maintainable, and these facts may be set up by way of replication. (See *supra*.)

Replication to the preceding Plea that the Defendant indorsed the Bill as Surety for the Acceptor and for his Accommodation.

That the plaintiff indorsed the said bill to the defendant without any value or consideration, in order that the same might be indorsed by the defendant to the plaintiff for the purpose of the defendant thereby becoming surety, as such indorser, for the payment of the said bill by the acceptor to the plaintiff; and the defendant indorsed the said bill to the plaintiff for the purpose aforesaid and as such surety as aforesaid, and for the accommodation of the said acceptor; and there never was any value or consideration for the indorsement or payment of the said bill by the plaintiff to the defendant.

Like replications: Wilders v. *Stephens*, 15 M. & W. 208; *Smith* v. *Marsack*, 6 C. B. 486.

A like plea and replication in an action by the indorsee of a note: Morris v. *Walker*, 15 Q. B. 589.

Plea of an Alteration of the Bill (*a*).

That after the said bill was drawn and accepted as aforesaid, and

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(*a*) A bill of exchange or promissory note is rendered void by an alteration made, after it is issued, in a material part without the consent of the party to be charged therewith, whether made by another party to it or by a stranger. (*Master* v. *Miller*, 1 Smith's L. C. 5th ed. 776; *Gardner* v. *Walsh*, 5 E. & B. 83; and see *ante*, p. 420 (*a*)). An indorsee for value taking it *bonâ fide* and without notice cannot recover upon it. (*Burchfield* v. *Moore*, 3 E. & B. 683.)

An alteration, made after the issuing of the bill or note with the consent of all parties, which materially changes the effect of the instrument, renders a new stamp necessary, and the bill or note cannot be given in evidence. (*Knill* v. *Williams*, 10 East, 431; *Bowman* v. *Nichol*, 5 T. R. 537; *Downes* v. *Richardson*, 5 B. & Ald. 674.) But this is not the case where the alteration was so made before the bill or note was issued, or where it was made to correct a mistake, and in furtherance of the original intention of the parties. (*Jacob* v. *Hart*, 6 M. & S. 142; *Byrom* v. *Thompson*, 11 A. & E. 31; Byles on Bills, 8th ed. 300; but see *Bradley* v. *Bardsley*, 14 M. & W. 873.)

Where a bill or note is declared upon in the form in which it was made or accepted, the defence that it has been altered after acceptance or making cannot in general be raised under a common traverse, but must be pleaded specially. (*Hemming* v. *Trenery*, 9 A. & E. 926; *Langton* v. *Lazarus*, 5 M. & W. 629; see "*Alteration of Written Contracts*," *ante*, p. 420.) Thus, in an action against one of the drawers of a joint and several promissory note, under the common traverse of the making of the note the defendant was held not to be entitled to set up the defence that one of the names was cut off the note after the making of it. (*Mason* v. *Bradley*, 11 M. & W. 590.) In an action by the indorsee against the indorser of a bill of exchange, under a traverse of the indorsement, the defendant cannot rely upon an alteration apparent on the bill, nor is the plaintiff called upon to explain it. (*Sibley* v. *Fisher*, 7 A. & E. 444.) If the alteration is such as to cause a variance between the statement in the declaration and the instrument when produced, or to raise an objection to the stamp on the document, the plaintiff would fail in his proof, and the defendant would obtain the advantage of the alteration under the common traverse. (*Waugh* v. *Bussell*, 5 Taunt. 707; per Parke, B., *Mason* v. *Bradley*, 11 M. & W. 590.) So where the plaintiff declared on a bill accepted generally, and the bill had been subse-

after it was issued, it was made void by being materially altered without the consent of the defendant, that is to say [by adding to the defendant's acceptance the words payable at ——; *or* by altering the words four pounds, being the rate of interest payable on the said bill, into five pounds; *or* by altering the words two months, being the period at which the said bill was payable, into the words one month; *or* by erasing the date, the —— day of ——, being the date of the said bill, and inserting the date, the —— day of ——, as the date of the said bill; *or as the case may be*].

Like pleas of alteration in the date: Atkinson v. *Hawdon*, 2 A. & E. 628; *Langton* v. *Lazarus*, 5 M. & W. 629; *in the amount: Hamelin* v. *Bruck*, 9 Q. B. 306; *by adding a place of payment to the acceptance: Burchfield* v. *Moore*, 3 E. & B. 683.

Plea of an Alteration in a Note.

That after the said note was made as aforesaid, and after it was issued, it was made void by being materially altered without the consent of the defendant, that is to say, [by cutting off the signature of *G. H.*, who was a joint-maker of the said note; *or* by *G. H.* signing the said note and becoming a joint-maker thereof; *or as the case may be*].

A like plea of an alteration by adding another maker: Gardner v. *Walsh*, 5 E. & B. 83; *by increasing the rate of interest: Warrington* v. *Early*, 2 E. & B. 763; *by inserting the date: Bradley* v. *Bardsley*, 14 M. & W. 873.

Plea that the note was materially altered after it was issued, without being re-stamped: Bradley v. *Bardsley*, 14 M. & W. 873. [*The*

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quently altered so as to be made payable at a particular place, it was held that the plaintiff was not entitled to a verdict on a traverse of *the acceptance*. (*Calvert* v. *Baker*, 4 M. & W. 417.) But where a bill had been altered in the date, and the plaintiff declared on the bill as altered, he was held entitled to recover on the plea traversing the acceptance, because the date charged in the declaration was immaterial, and the alteration should have been specially pleaded. (*Parry* v. *Nicholson*, 13 M. & W. 778.)

Where the bill or note has been materially altered, and the plaintiff declares upon the instrument in its altered form, the alteration need not be pleaded, but the defendant may rely upon the alteration under a traverse of the making or accepting of the instrument alleged. (*Cock* v. *Coxwell*, 2 C. M. & R. 291.) And under such traverse the defendant may object to the stamp on the altered instrument. (*Knight* v. *Clements*, 8 A. & E. 215; *Clifford* v. *Parker*, 2 M. & G. 909.) As to what alterations are material, see *Master* v. *Miller*, 1 Smith's L. C. 5th ed. 776 notes; Byles on Bills, 8th ed. 299; Taylor on Evidence, 3rd ed. 1447; and the cases cited above.

The party producing a bill or note containing a manifest ambiguity arising out of an alteration, as to the time of drawing or otherwise, is bound to explain the ambiguity if called upon to do so by the issue raised. (*Henman* v. *Dickinson*, 5 Bing. 183; *Parry* v. *Nicholson*, 13 M. & W. 778; *Knight* v. *Clements*, 8 A. E. 215; *Clifford* v. *Parker*, 2 M. & G. 909; *Byrom* v. *Thompson*, 11 A. & E. 31.) But this is unnecessary where the document is admitted upon notice (*Freeman* v. *Steggall*, 14 Q. B. 202); or where it is admitted upon the record, as upon a plea traversing the indorsement. (*Sibley* v. *Fisher*, 7 A. & E. 444.)

plea in this case was held bad for not showing that the note could not be stamped before trial; and see ante, p. 420.]

Replication to plea that a note was altered so as to require a new stamp, that it was altered to correct a mistake according to the real intention of the parties: Ib.

Plea, in an action by indorsee against acceptor, that the bill was altered after it was accepted and issued: Burchfield v. *Moore,* 3 E. & B. 683. [*Where a replication that the plaintiff took it after the alteration, without notice and for value, was held bad.*]

Plea in an Action by the Drawer against the Acceptor, that the Bill has been lost by the Plaintiff (*a*).

That [*add, if this does not appear on the declaration,* the said bill is payable to order and transferable by indorsement, and] after the acceptance of the said bill the plaintiff, whilst he was the holder thereof, lost the said bill out of his possession and control, and the same thence has been and still is so lost.

A like plea: Ramuz v. *Crowe,* 1 Ex. 167.

Plea, to an action for goods sold, that a bill of exchange was accepted by the defendant for the price payable to the plaintiff's order, and that the plaintiff has lost the bill: Crowe v. *Clay,* 8 Ex. 295; 9 Ex. 604.

Plea of Waiver of the Bill or Note (*b*).

That after the defendant had accepted the said bill [*or* made the said note] and whilst the plaintiff was the holder thereof, the plain-

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(*a*) This defence must be pleaded, and cannot be relied on under a traverse of the acceptance of the bill or making of the note; for under the latter issues secondary evidence would be admissible on proof of the loss. (*Blackie* v. *Pidding,* 6 C. B. 196; *Charnley* v. *Grundy,* 14 C. B. 608.) It cannot be pleaded to a non-negotiable note, payable to the plaintiff only. (Ib.; *Wain* v. *Bailey,* 10 A. & E. 616.) It is a good defence to an action on a negotiable instrument, and a replication that when the plaintiff lost the bill he had not indorsed it, and it was not transferable by delivery, was held bad. (*Ramuz* v. *Crowe,* 1 Ex. 167; and see *Hansard* v. *Robinson,* 7 B. & C. 90.) This defence is an answer to a count on the consideration for the bill as well as to a count on the bill itself. (*Crowe* v. *Clay,* 8 Ex. 295; 9 Ex. 604.)

It is now enacted by the 87th sect. of the C. L. P. Act, 1854, that "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument."

(*b*) By the law merchant contracts on bills of exchange or promissory notes may be discharged by express renunciation or waiver by the holder, before or after the instrument becomes payable, without deed and without any consideration. (Byles on Bills, 8th ed. 182; *Foster* v. *Dawber,* 6 Ex. 851; see *post,* "*Rescission of Contract.*")

tiff by express renunciation and waiver of the said bill [*or* note] exonerated and discharged the defendant from the payment of the same and from all liability thereon.

Like pleas: Steele v. *Harmer*, 14 M. & W. 831; *Foster* v. *Dawber*, 6 Ex. 839.

Plea, in an Action against the Drawer, that the Plaintiff agreed with the Acceptor to give him time for Payment (a).

That the said *G. H.* accepted the said bill, and afterwards and after the indorsement of the said bill to the plaintiff and after it became due, the plaintiff, whilst he was the holder thereof, did, without the consent of the defendant and for a good and sufficient consideration in that behalf, agree with the said *G. H.* to give him, and then accordingly gave him, time for the payment of the said bill.

A like plea: Isaac v. *Daniel*, 8 Q. B. 500; *Smith* v. *Winter*, 4 M. & W. 454.

A like plea of an agreement between the holder and the acceptor to give time to the acceptor in consideration of his procuring another bill: Moss v. *Hall*, 5 Ex. 46.

Plea that the plaintiff took a cognovit in an action against a previous indorser giving a longer time for payment than the time in which he might have obtained judgment: Hall v. *Cole*, 4 A. & E. 577; *Price* v. *Edmunds*, 10 B. & C. 578.

Plea that the plaintiff had sued the acceptor and had consented to a judge's order that upon payment of principal and interest on a future day all proceedings should be stayed: Kennard v. *Knott*, 4 M. & G. 474; *Michael* v. *Myers*, 6 M. & G. 702 (*b*).

Plea that the plaintiff had sued the acceptor and agreed in consideration of £2 to stay all proceedings in that action for two months: Isaac v. *Daniel*, 8 Q. B. 500.

Plea on equitable grounds, to an Action against one of several joint Makers of a Promissory Note, that the Defendant made the Note as surety only for another Maker to whom the Plaintiff gave time (c).

[*Commence with the form, ante, p.* 387.] That he made the said

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(*a*) The drawer of a bill of exchange is in the position of a surety for the acceptor; so an indorser of a bill or note is a surety for all the previous parties. Consequently, if the holder of a bill or note, by a binding contract with the acceptor or an indorser, gives time for payment, the subsequent parties to the bill or note who stand in the position of sureties are in general discharged from liability. (*English* v. *Darley*, 2 B. & P. 61; *Philpot* v. *Briant*, 4 Bing. 717, 720; *Clarke* v. *Wilson*, 3 M. & W. 208; and see *post*, "*Guarantee*," p. 507 (*a*).) A contract made with a stranger to the bill to give time to the acceptor will not have the effect of discharging the drawer or indorser. (*Lyon* v. *Holt*, 5 M. & W. 250; *Fraser* v. *Jordan*, 26 L. J. Q. B. 288; 8 E. & B. 303.)

(*b*) In such plea it must appear that the future day appointed for payment is posterior to the day on which judgment might have been obtained in the action, and the judge's order must amount to an absolute stay of proceedings. (Ib.)

(*c*) Where the position of the defendant on the bill or note is apparently

note jointly with *I. K.* and *L. M.* for the accommodation of the said *I. K.* and as his surety only, to secure a debt due to the plaintiff from the said *I. K.* solely, of which the plaintiff at the time of the making of the said note had notice, and except as aforesaid there never was any value or consideration for the making or payment of the said note by the defendant; and after it became due the plaintiff whilst he was the holder of the said note did, without the consent of the defendant, and for a good and sufficient consideration in that behalf, agree with the said *I. K.* to give him, and then accordingly gave him, time for the payment of the said note beyond the time when the same was due and payable.

Like pleas: Strong v. *Foster*, 17 C. B. 201; 25 L. J. C. P. 136; *Pooley* v. *Harradine*, 7 E. & B. 431; 26 L. J. Q. B. 156; *Rayner* v. *Fussey*, 28 L. J. Ex. 132; *Taylor* v. *Burgess*, 29 L. J. Ex. 7; 5 H. & N. 1; *Greenough* v. *M'Clelland*, 30 L. J. Q. B. 15.

A like plea on equitable grounds to a like action, stating that the plaintiff negligently lost the benefit of security he had against the principal debtor: Mutual Loan Ass. v. *Sudlow*, 28 L. J. C. P. 108; 5 C. B. N. S. 449.

A like plea on equitable grounds stating an agreement between the plaintiff and the defendant, that the plaintiff should demand payment of the note from the principal maker within three years, which he omitted to do: Lawrence v. *Walmsley*, 31 L. J. C. P. 143.

Replication to the preceding plea, that upon the agreement to give time to the principal debtor the remedies against the sureties were reserved. *See post*, "*Guarantees*," *p.* 508.

Plea of Payment to the Plaintiff.

That before action he satisfied and discharged the plaintiff's claim by payment. (*See post*, "*Payment.*")

Plea, to an Action by the Indorsee against the Drawer, of Payment by the Acceptor.

That after the said bill became due, and whilst the plaintiff was the holder thereof, the said *G. H.* satisfied and discharged the principal and interest due on the said bill by payment.

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that of a principal and not that of a surety, though he is in fact a surety, as in the case of a joint acceptance or joint promissory note where one of the acceptors or makers is surety for the other, this fact cannot be set up as a *legal* defence, notwithstanding the plaintiff was aware of the relationship between the parties. (*Price* v. *Edmunds*, 10 B. & C. 578; *Clarke* v. *Wilson*, 3 M. & W. 208; *Manley* v. *Boycot*, 22 L. J. Q. B. 265.) But it is a good plea on *equitable* grounds that the defendant made the note as surety for the other maker, and that the plaintiff knew that he was only surety and accepted him as such, and that the plaintiff by a binding contract gave time to the principal debtor without the defendant's consent. (See the cases, *supra*.)

Plea in an action by the indorsee against the acceptor, that the bill was accepted for the accommodation of the drawer, who paid the amount to the plaintiff: Bell v. *Buckley*, 11 Ex. 631 (*a*).

Plea in an action by the indorsee against the acceptor, that the drawer at the request of the defendant paid the amount of the bill to the plaintiff, upon the terms that he should retire the bill and deliver it up to the drawer: Elsam v. *Denny*, 15 C. B. 87.

Plea to an Action by the Indorsee against the Acceptor, of Payment to the Drawer after the bill was due, and subsequent Indorsement by the latter (*b*).

That after the said bill was due, and whilst the said *G. H.* was the holder thereof, the defendant satisfied and discharged the principal and interest due on the said bill by payment to the said *G. H.*, and the said *G. H.* first indorsed the said bill to the plaintiff after the said payment.

A like plea: Phillips v. *Warren*, 14 M. & W. 379.

A like plea to a note: Bartrum v. *Caddy*, 9 A. & E. 275; *Cripps* v. *Davis*, 12 M. & W. 159.

Plea of Payment of Part of a Note to a prior Holder, and subsequent Indorsement to the Plaintiff for the residue only with notice, and Payment to the Plaintiff of the residue.

That after the making of the said note and before it became due, and whilst the said *L. M.* was the holder thereof, the defendant satisfied and discharged the sum of £——, parcel of the said note,

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(*a*) In an action by the indorsee against the acceptor, on a bill not being an accommodation acceptance, a plea of payment made by the drawer, where the acceptor is no party to the transaction, is a bad plea. (*Jones* v. *Broadhurst*, 9 C. B. 173; *Elsam* v. *Denny*, 15 C. B. 87.)

The holder of a bill is entitled to sue the several parties liable to him in separate actions, and to proceed in each action for the recovery of his costs; therefore in an action by the indorsee against the acceptor, payment by the drawer after action is no defence, unless made and pleaded in respect of all the damages and costs in the action. (*Randall* v. *Moon*, 21 L. J. C. P. 226; *Goodwin* v. *Cremer*, 18 Q. B. 757; *Kemp* v. *Balls*, 10 Ex. 607; see *ante*, p. 388.)

By r. 24, H. T. 1853, "in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only." (See *Smith* v. *Woodcock*, 4 T. R. 691.)

(*b*) A bill of exchange continues negotiable until paid at or after maturity by the acceptor or party primarily liable. (*Callow* v. *Lawrence*, 3 M. & S. 95.) Payment by the drawer before or after the bill is due is a purchase of the bill, and he may reissue it. (Ib.; *Lazarus* v. *Cowie*, 3 Q. B. 465.) So also payment by the acceptor before the bill is due is a purchase of the bill, and he may reissue it. (*Morley* v. *Culverwell*, 7 M. & W. 174; *Attenborough* v. *Mackenzie*, 25 L. J. Ex. 244.) As to the negotiation of the bill by the acceptor after it is due, see *Steele* v. *Harmer*, 14 M. & W. 831, 844. Payment by the drawer of a bill accepted for his accommodation is equivalent to payment by the acceptor. (*Parr* v. *Jewell*, 16 C. B. 684.)

The indorsee of an overdue bill takes it subject to all the equities that attach to the bill in the hands of the holder at the time of its becoming due, arising out of or connected with the bill transaction itself, such as payment

by payment to the said *L. M.* of £—— on account thereof; and the said *L. M.* afterwards indorsed the said note to the plaintiff, as in the first count mentioned, and the plaintiff first had and received the same with notice of the premises, and on the terms that the defendant should be liable to the plaintiff on the said note for and in respect of the residue only of the amount of the said note; and the defendant further says that he afterwards satisfied and discharged the said residue of the amount of the said note, and all the plaintiff's claim in respect of the said note by payment to the plaintiff.

Plea to an action by the indorsee against the acceptor, that the defendant deposited goods with the drawer to meet the bill, out of the proceeds of the sale of which the drawer paid himself, and afterwards indorsed the bill when overdue: Holmes v. *Kidd*, 28 L. J. Ex. 112.

Plea to an action by the indorsee against the acceptor, that the bill was accepted for the accommodation of the drawer, and was paid by him when due, and indorsed when overdue to the plaintiff: Parr v. *Jewell*, 16 C. B. 684.

Plea that the bill was for the accommodation of the drawer, that it was taken up by the drawer when due, and was reissued without a new stamp when overdue: Lazarus v. *Cowie*, 3 Q. B. 459.

Plea to an Action by an Indorsee against the Acceptor, that the Holder at Maturity recovered Judgment against Defendant on it, and that the Plaintiff afterwards took it with Notice (a).

That the said *G. H.* was the lawful holder of the said bill when it became due, and thereupon impleaded the now defendant, as and being the acceptor of the said bill, in the Court of Queen's Bench in an action at his suit against the now defendant upon the said bill for the recovery of the amount thereof, and damages for the non-payment thereof; and such proceedings were thereupon had in the last-mentioned action, that afterwards the said *G. H.* recovered therein judgment of the said court against the now defendant for the amount of the said bill and all damages sustained by the said *G. H.* by reason of the non-payment thereof, together with his costs of suit; and afterwards the said *G. H.* transferred the said bill to

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or satisfaction of the bill to the holder, or an agreement forming part of the bill transaction (*Burrough* v. *Moss*, 10 B. & C. 558; *Whitehead* v. *Walker*, 10 M. & W. 696; see per Cresswell, J., *Sturtevant* v. *Ford*, 4 M. & G. 101, 106); but not subject to claims against the holder arising out of collateral matters, as a general right of set-off under the statute. (*Stein* v. *Yglesias*, 1 C. M. & R. 565; *Watkins* v. *Benuson*, 9 M. & W. 422; *Oulds* v. *Harrison*, 10 Ex. 572.) A promissory note payable on demand is not considered as overdue within the above rule so as to affect an indorsee with its equities. (*Barough* v. *White*, 4 B. & C. 325; *Brooks* v. *Mitchell*, 9 M. & W. 15.)

(a) The transferee of a bill or note after action brought upon it, with notice of the action, cannot commence a fresh action (*Marsh* v. *Newell*, 1 Taunt. 109; *Jones* v. *Lane*, 3 Y. & C. 281); but if he took it without notice, it seems he may. (See Byles on Bills, 8th ed. 160.)

the plaintiff, and the plaintiff took and received the same with notice of the premises.

Plea by the Payee of a Note against the Maker, that the Consideration for it was a Debt from which the Defendant had been discharged under the Insolvent Act 1 *&* 2 *Vict. c.* 110.

That, before the making of the said note and the discharge of the defendant hereinafter mentioned, he was indebted to the plaintiff in £——; and was duly discharged from the said debt under and according to the statute passed in the second year of the reign of Queen Victoria for (amongst other things) amending the laws for the relief of insolvent debtors in England, by an order of adjudication duly made in that behalf, which order still remains in force; and after the said discharge the defendant, at the plaintiff's request, made the said note for and in consideration of the said debt of £——, from which the defendant was so discharged as aforesaid [and for securing to the plaintiff interest on the said debt, as in the declaration mentioned]; and there never was any value or consideration for the making or payment of the said note by the defendant except as in this plea mentioned.

Pleas of accord and satisfaction to bills of exchange, ante, p. 415.

Plea of accord and satisfaction made to the drawer, and subsequent indorsement to the plaintiff after the bill was due: Mitchell v. *Cragg,* 10 M. & W. 367.

Pleas setting up Agreements affecting the Bill or Note (*a*).

Plea that the note was given by the defendant as surety only and upon a written agreement that he should have written notice of default in the principal debtor before being sued: Brown v. *Langley,* 4 M. & G. 466.

Plea in an action by the indorsee against the maker of a note, that by an agreement in writing between the defendant and the payee the note was not to be enforced except on certain terms which were not complied with, and that plaintiff received the note without consideration: Edwards v. *Jones,* 2 M. & W. 414.

(*a*) The rights under a bill or note may be affected by an agreement in writing made at the same time and between the same parties, and incorporating it as part of the agreement. If the bill or note is intended to be a distinct and separate security, it is not affected by a collateral agreement merely referring to it; so an agreement made subsequently to the bill or note, or between different parties, cannot affect the rights under it. (*Brill* v. *Crick,* 1 M. & W. 232; *Spiller* v. *Westlake,* 2 B. & Ad. 155; *Webb* v. *Spicer,* 13 Q. B. 886.) Agreements affecting the right of action upon a bill or note are binding only on the parties thereto, and on persons taking the bill with its equities. A verbal agreement will not affect the rights of the parties on the instrument. (*Adams* v. *Wordley,* 1 M. & W. 374; *Capner* v. *Mincher,* 13 M. & W. 704.) Want of consideration or failure of consideration may be shown by verbal evidence. (See the cases referred to above, Byles on Bills, 8th ed. pp. 89, 90; Chitty on Bills, 10th ed. pp. 91–93.)

BILL TAKEN FOR THE DEBT.

That the Defendant accepted a Bill of Exchange which is still running on account of the Debt (a).

That after the accruing of the alleged debt, he delivered to the plaintiff and the plaintiff received from him, for and on account of the said debt and the causes of action in respect thereof, a bill of exchange drawn by the plaintiff upon and accepted by the defendant for the payment of £—— to the plaintiff or order, —— months after date, which period had not elapsed at the commencement of this suit.

Pleas that the defendant gave a blank acceptance on account of the debt payable at a time not yet elapsed: Simon v. *Lloyd*, 2 C. M. & R. 187; *Baker* v. *Jubber*, 1 M. & G. 212; *Huxley* v. *Bull*, 7 M. & G. 571.

Plea to an action on a note, that the defendant gave bills to take it up which are not yet due: Goldshede v. *Cottrell*, 2 M. & W. 20.

Plea that the defendant accepted a bill on account of the debt, which the plaintiff has indorsed away: Emblin v. *Dartnell*, 1 D. & L. 591; *Wright* v. *Watts*, 3 Q. B. 89; *Belshaw* v. *Bush*, 11 C. B. 191; *Maillard* v. *Duke of Argyle*, 6 M. & G. 40.

Plea that the defendant accepted a bill on account of the debt, which the plaintiff has lost: Crowe v. *Clay*, 8 Ex. 295; 9 Ex. 604.

Plea that the defendant gave a note on account of the debt, and afterwards gave a warrant of attorney in accord and satisfaction of the note: Fearn v. *Cochrane*, 4 C. B. 274.

That the Defendant indorsed a Bill to the Plaintiff on account of the Debt.

That after the accruing of the alleged debt, he indorsed and delivered to the plaintiff and the plaintiff received from him, for

(a) The giving of a negotiable security on account of a simple contract debt operates as a conditional payment, *i. e.* a payment if the security is paid when due; and it suspends the right of action in the meantime, and is a good defence (*Kearslake* v. *Morgan*, 5 T. R. 513; *James* v. *Williams*, 13 M. & W. 828, 833; *Belshaw* v. *Bush*, 11 C. B. 191); but it affords no answer to a bond or specialty debt (*Ib.*; *Worthington* v. *Wigley*, 3 Bing. N. C. 454), nor is it a defence that judgment has been recovered on a bill given for a specialty debt. (*Drake* v. *Mitchell*, 3 East, 251.) So the giving of a bill on account of a debt for rent for which the plaintiff has a remedy by distress, is no defence to an action for the amount (*Ib.*; *Davis* v. *Gyde*, 2 A. & E. 623). But forbearing to sue on a specialty or judgment-debt is a good consideration for a bill or note. (*Baker* v. *Walker*, 14 M. & W. 465.)

In pleading this defence, when the defendant's appears to be the only name on the bill or note, the plea must show that it is not yet due, or that it has been indorsed away by the plaintiff, so that the defendant is still liable on it. (*Simon* v. *Lloyd*, 2 C. M. & R. 187; *Goldshede* v. *Cottrell*, 2 M. & W. 20; *Price* v. *Price*, 16 M. & W. 232.) Where it appears that the names of other parties are on the instrument, it is sufficient to state that it was taken on account of the debt; and it lies on the plaintiff to state by way of replication that it has been dishonoured, if such is the case. (Ib.)

If the security has been duly paid, it operates as payment of the original

and on account of the said debt and the causes of action in respect thereof, a bill of exchange not then due drawn by the defendant [*or* by *G. H.*] upon, and accepted by *I. K.*, whereby the defendant [*or* the said *G. H.*] required the said *I. K.* to pay to the defendant or order £—— —— months after date.

Plea that the defendant indorsed a note to the plaintiff for and on account of the debt: Kearslake v. *Morgan*, 5 T. R. 513.

Plea that a partner or joint-debtor with the defendant accepted a bill drawn by the plaintiff for the debt: Bottomley v. *Nuttall*, 28 L. J. C. P. 110; 5 C. B. N. S. 122.

Plea that a third party has accepted a bill drawn by the plaintiff for and on account of the debt: Belshaw v. *Bush*, 11 C. B. 191.

Plea that the defendant gave the plaintiff a bill drawn on a third person payable after sight, and that the plaintiff kept the bill for an unreasonable time before presentment for acceptance, whereby the drawee was unable to pay it, and it was dishonoured: Straker v. *Graham*, 4 M. & W. 721.

That the defendant delivered to the plaintiff a bill accepted by a third person, and the plaintiff altered it, and thereby made it void: Alderson v. *Langdale*, 3 B. & Ad. 660.

Plea that the Defendant indorsed to the Plaintiff on account of the debt a bill on G. H., and that the Plaintiff gave G. H. time for payment on a valid agreement without the Defendant's consent.

That after the accruing of the alleged debt he indorsed and delivered to the plaintiff and the plaintiff received from him, for and on account of the said debt and the causes of action in respect thereof, a bill of exchange dated the —— day of ——, A.D. ——, drawn by the defendant upon, and accepted by *G. H.*, whereby the defendant required the said *G. H.* to pay to the defendant or order £—— —— months after date; and after the said bill became due the plaintiff, whilst he was the holder thereof, did without the consent of the defendant and for a good and sufficient consideration in that behalf agree with the said *G. H.* to give him, and then accordingly gave him, time for payment of the said bill.

Replication to a Plea that the Defendant accepted a Bill drawn by a third party, that the Bill is overdue and dishonoured (*a*).

That before action the said bill became due, and the defendant

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debt, and should be pleaded as such. (See *Fearn* v. *Cochrane*, 4 C. B. 274; and see *post* "*Payment.*")

A negotiable instrument may also be taken in satisfaction and discharge of a debt; as to which, see *ante*, "*Accord and Satisfaction*," p. 415.

(*a*) The plea averring that the defendant accepted a bill drawn by the plaintiff, which is still current, or has been indorsed away (*supra*), is sufficiently met by a replication taking issue. The plea that the defendant has accepted a bill drawn by a third party need not aver that it is still current or has been paid, but the replication must show that it is overdue and dishonoured. The replication to the plea that the defendant drew or indorsed a bill accepted by a third party, must state a presentment and notice of dishonour, as in the next form.

has not paid the same, and the plaintiff at the commencement of this action held and still holds the said bill unpaid and unsatisfied.

A like replication: Atkinson v. *Hawdon*, 2 A. & E. 628.

Replication to a Plea that the Defendant indorsed to the Plaintiff a Bill accepted by a third party, that the Bill is overdue and dishonoured.

That before action and when the said bill became due and payable, it was duly presented for payment to the said acceptor thereof and was dishonoured, whereof the defendant then had due notice, but did not pay the same, and the plaintiff at the commencement of this action held and still holds the said bill unpaid and unsatisfied.

A like replication: Belshaw v. *Bush*, 11 C. B. 191.

Pleas of bills and notes taken in accord and satisfaction: see ante, "Accord and Satisfaction," p. 415.

Bonds (*a*).

Plea of Non est factum to a Bond.

That the alleged bond is not his deed.

A special plea that the bond was delivered as an escrow: Murray v. *Earl of Stair*, 2 B. & C. 82.

(*a*) The execution of the bond is denied by the plea of *non est factum*. (See *ante*, p. 403.) By r. 10, T. T. 1853, "in actions on specialties, the plea of *non est factum* operates as a denial of the execution of the deed in point of fact only, and all other defences must be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." By r. 11, "the plea of *nil debet* shall not be allowed in any action;" and by r. 12, "all matters in confession and avoidance shall be pleaded specially, as above directed (see *ante*, p. 401) in actions on simple contracts."

Under the issue raised by the plea of *non est factum* the plaintiff must prove that the defendant executed a bond agreeing with that charged in the declaration, and the defendant may rely upon any material variance.

If the defendant relies upon a performance of the condition of the bond, or an excuse for not performing it, the form of his plea will depend upon the form of the declaration. If the count sets out the condition and assigns breaches, the defendant must traverse the breaches in terms or plead the matter of excuse. If the count is framed for the penalty only, without mentioning the condition, the defendant must set out the condition in the plea and aver performance or the matter in excuse of performance. (See *ante*, p. 97; 2 Wms. Saund. 409, n. (2).)

Before the C. L. P. Act, 1852, the defendant must, in general, have pleaded performance of the condition with particularity, following the exact terms; but in some cases, to avoid prolixity, he was allowed to plead performance generally—the plaintiff being obliged to assign in his replication the specific breaches charged. As to where it was proper to plead performance generally, see 1 Wms Saund. 116, n. (1); 2 Ib. 409, 410; *Roakes* v. *Mauser*, 1 C. B. 531; *Grey* v. *Friar*, 15 Q. B. 891, 909. Pleading performance generally, however, could only be objected to by special demurrer,

Plea that the alleged bond was made abroad, and was invalid according to the law there in force: Benham v. *Mornington*, 3 C. B. 133.

Plea to a Count on a common Money Bond of Payment according to the Condition. (Solvit ad diem.)

That the said bond was and is subject to a condition thereunder written, to make void the same upon payment by the defendant to the plaintiff on the —— day of ——, A.D. ——, of £——, with interest for the same in the meantime at £—— per cent. per annum; and the defendant on the last-mentioned day paid to the plaintiff the said £——, with the said interest for the same, according to the said condition.

Plea to a Count on a common Money Bond of Payment after the Day, but before Action. (Solvit post diem (a).)

That the said bond was and is subject to a condition thereunder written, to make void the same upon payment by the defendant to the plaintiff on the —— day of ——, A.D. ——, of £——, with interest for the same in the meantime at £—— per cent. per annum; and the defendant after the last-mentioned day and before action paid to the plaintiff the said £——, with all interest then due thereon.

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and therefore seems no longer open to objection, unless calculated to embarrass the plaintiff. And see C. L. P. Act, 1852, s. 57; *ante*, p. 377.

The defences of performance or of matters excusing performance of the condition must be pleaded in one of the above ways, and cannot be set up on an inquiry to assess damages upon a suggestion of breaches. (*Abp. Canterbury* v. *Robertson*, 1 C. & M. 690; *Warre* v. *Calvert*, 7 A. & E. 143.)

If the time fixed by the condition for the performance of it has not yet arrived, it will be sufficient to set out the condition. (C. L. P. Act, 1852, s. 56; *ante*, 377.) If the performance depends on a contingency which has not yet happened, the condition of the bond should be set out, and then the plea should deny the happening of the contingency. (See *Cage* v. *Acton*, 1 L. Raym. 515, 519; *Carter* v. *Ring*, 3 Camp. 459.)

(*a*) Payment *post diem* or in satisfaction could not be pleaded at common law to an action on a bond (*Nichol's case*, 5 Co. Rep. 43 *a*); but the plea is given by the statute 4 & 5 Anne, c. 16, s. 12, which enacts "that where an action of debt shall be brought upon any single bill (*i. e.* bond without condition), if the defendant hath paid the money due upon such bill, such payment shall and may be pleaded in bar of such action or suit; and where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may nevertheless be pleaded in a bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."

It has been held that this plea may be pleaded to part of the money due under the condition. (*Husband* v. *Davis*, 10 C. B. 645.) But see *Ashbee* v. *Pidduck*, 1 M. & W. 564; *Marriage* v. *Marriage*, 1 C. B. 761; *Worthington* v. *Wigley*, 3 Bing. N. C. 454.

Plea of Payment into Court to a count on a Common Money Bond (a).

That the said bond was and is subject to a condition, to make void the same upon payment by the defendant to the plaintiff, on the —— day of ——, A.D. —— of £——, with interest for the same in the meantime at £—— per cent. per annum; and the defendant brings into court the sum of £—— [*the amount of the principal and interest due by the condition of the bond*], and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Plea, to a Count on a Bond with a Special Condition within 8 & 9 Will. III. c. 11, of Performance generally (b).

That the said bond was and is subject to a condition, whereby [after reciting that *here state the material recitals, if any, in the condition*], the condition of the said bond was declared to be that if [*here state the condition*], then the said bond should be void; and before this suit the defendant performed and fulfilled all the matters and things in the said condition mentioned on his part to be performed and fulfilled according to the said condition.

A like plea: Roakes v. *Manser*, 1 C. B. 531; *and replication assigning a breach of the condition: ib.*

(*a*) The C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 25, enacts that "in any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond; and such payment into court shall be made and pleaded in like manner, and according to the provisions of the 'Common Law Procedure Act, 1852,' and the like proceedings may be had and taken thereupon as to costs and otherwise." (See *post*, "*Payment into Court;*" *ante*, "*Bonds*," p. 96.)

In actions on bonds within 8 & 9 Will. III. c. 11, payment into court cannot be pleaded, as the plaintiff is entitled to judgment on the bond as security for further breaches. (*Bishop of London* v. *M'Neil*, 9 Ex. 490.)

The 4 & 5 Anne, c. 16, s. 13, allows a defendant who has not paid the amount mentioned in the condition of the bond, either *ad diem* or *post diem* before action, to bring the principal and interest with costs into court; but this provision does not allow the payment into court to be pleaded. (See *ante*, p. 96.) The equitable jurisdiction of the court under this section is not taken away, although in practice it may generally be found superseded by the C. L. P. Act, 1860, s. 25, above cited. As to this jurisdiction, see 2 Chit. Pr. 11th ed. 1365.

(*b*) Where the matters contained in the condition are in the negative or alternative form, the above general plea should be altered so as to apply to the form of the condition. In such cases the defendant should aver that he did not do such things as are specified in the condition as not to be done, and he should show which of the alternative acts specified he has performed. The above form is also inapplicable where he relies upon some matter of excuse for the non-performance of any part of the condition. Such matter of excuse must be stated in the plea. (1 Wms. Saund. 116, n. (1); and see 3 Chit. Pl. 7th ed. 196.)

Pleas, to actions on bonds of guarantee, of performance of all matters by the party guaranteed: see post, "Guarantees," p. 506.

Plea to an action on a bond of guarantee, stating excuse of performance by the party guaranteed: Webb v. *James,* 7 M. & W. 279.

Plea to an action on a bail-bond, that the plaintiff prevented the performance of the condition by seizing the debtor under a ca. sa.: Hayward v. *Bennett,* 3 C. B. 404.

Plea, to a bond conditioned for the payment of money on demand, that no demand was made: Carter v. *Ring,* 3 Camp. 459; *Thorne* v. *Jenkins,* 12 M. & W. 614.

Plea that the bond was given for an immoral consideration: post, "Illegality," p. 511.

Plea of a set-off of a debt due on a bond: see post, "Set-off."

Broker.

Plea, to an action for work done, that it was done by the plaintiff as a broker, within the City of London, and that he was not duly licensed: Cope v. *Rowlands,* 2 M. & W. 149; *Milford* v. *Hughes,* 16 M. & W. 174 (*a*).

Carriers.

General issue (*b*).

"Non assumpsit," *ante, p.* 401.

(*a*) An unlicensed broker cannot recover any commission for work done as a broker, 6 Anne, c. 16. (*Smith* v. *Lindo,* 27 L. J. C. P. 196, 335; 4 C. B. N. S. 395; where see also what constitutes a broker within the statute.) This defence does not extend to an action for money paid by such a broker in pursuance of the plaintiff's request. (*Pidgeon* v. *Burslem,* 3 Ex. 465; *Jessop* v. *Lutwyche,* 10 Ex. 614; *Smith* v. *Lindo, supra.*)

(*b*) If the declaration against a carrier is framed upon a contract, the contract is denied by the general issue, *non assumpsit.* Such plea will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach (r. 6, T. T. 1853). The breach, if denied, should be traversed in terms. If the declaration is framed in tort, the general issue *not guilty* will be appropriate, and will operate as a denial of the breach of duty alleged, or of the loss or damage of the goods, but not of the delivery of the goods and the receipt of them by the defendant as a carrier for hire, or of the purpose for which they were received (r. 16, T. T. 1853). The delivery and receipt of the goods or the facts giving rise to the duty must in that case be specifically traversed. If it is doubtful whether the declaration is framed for a breach of contract or for a wrong, either form of general issue may be adopted without objection. (C. L. P. Act, 1852, s. 74, *ante,* p. 397.)

Plea traversing the Delivery and Receipt of the Goods.

That the plaintiff did not deliver to the defendant, nor did the defendant receive from the plaintiff, the said goods for the purpose and on the terms alleged.

Plea traversing the Breach.

That he carried the said goods from —— to —— aforesaid, and there delivered the same for the plaintiff within a reasonable time in that behalf.

Plea under the Carriers Act, 1 Will. IV. c. 68, that the Goods were within the Act, and were above the Value of £10, and were not declared or insured (a).

That the said goods were articles and property of the description mentioned in the first section of the statute passed in the first year

(a) By the 11 Geo. IV. & 1 Will. IV. c. 68, s. 1 (commonly called the Carriers Act), it is enacted "that from and after the passing of this Act no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following (that is to say): gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds; unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

By s. 2, "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail-contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purposes of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as afore-

of the reign of King William IV., for the more effectual protection of common carriers for hire, and were contained in a parcel which, with the said goods therein contained, was delivered by the plaintiff to the defendant as and being a common carrier by land for hire, at a certain office or receiving-house of the defendant, for the purpose of being by him as such carrier carried for hire [*or* to accompany the person of the plaintiff as such passenger] as in the declaration mentioned, in a public conveyance; and the value of the said goods then exceeded the sum of £10; and at the time of the delivery of the said parcel and goods as aforesaid, there was affixed in legible characters in a public and conspicuous part of the said office or receiving-house, being an office or receiving-house of the defendant where such parcels were then received by the defendant

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said at such office shall be bound by such notice, without further proof of the same having come to their knowledge."

By s. 3, "when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail-contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

By s. 4, "no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail-contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail-contractors, stage-coach proprietors, and other common carriers as aforesaid, shall be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding."

By s. 5, "for the purpose of this Act every office, warehouse, or receiving-house which shall be used or appointed by any mail-contractor or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office of such mail-contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail-contractors, stage-coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."

By s. 6, "nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, or any other parties, for the conveyance of goods and merchandises."

By s. 7, "where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased

for the purpose of conveyance, a notice within the meaning of the said statute, whereby the defendant notified that an increased rate of charge in the said notice mentioned was required to be paid to him over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of articles and property of the description in the first section of the said statute mentioned; and at the time of the delivery of the said parcel and goods at the said office or receiving-house of the defendant as aforesaid, for the purpose aforesaid, the value and nature of the said goods were not declared by the person sending or delivering the same, and neither such increased charge as aforesaid, nor any engagement to pay the same was accepted by the person receiving the said parcel and goods.

Like pleas: Syms v. *Chaplin*, 5 A. & E. 634; *Hinton* v. *Dibbin*, 2 Q. B. 646; *Machu* v. *South-Western Ry. Co.*, 2 Ex. 415; *Butt* v. *Great Western Ry. Co.*, 11 C. B. 140; *Metcalfe* v. *London and Brighton Ry. Co.*, 27 L. J. C. P. 205; *Hearn* v. *London and South-*

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charges so paid as aforesaid, in addition to the value of such parcel or package."

By s. 8, "nothing in this Act shall be deemed to protect any mail-contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, bookkeeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

By s. 9, "such mail-contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail-contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned."

By s. 10, the defendant may pay money into court as in any other action; but see now C. L. P. Act, 1852, s. 70; *post*, "*Payment into Court.*"

The plea under this statute is no defence to a count for delay in delivering the goods, or for any default or negligence in the carrier other than a loss of or injury to the goods. (*Hearn* v. *London and South-Western Ry. Co.*, 10 Ex. 793; *Pianciani* v. *London and South-Western Ry. Co.*, 18 C. B. 226.) The statute protects the carrier from all liability except for the felonious acts of his servants. Hence a replication to the above plea that the loss was occasioned by the defendant's negligence was held bad. (*Hinton* v. *Dibbin*, 2 Q. B. 646.) Under the statute, s. 8, the carrier is liable for the felonious acts of his servants, whether arising from his own negligence or not. (*Metcalfe* v. *London and Brighton Ry. Co.*, 27 L. J. C. P. 205; 4 C. B. N. S. 307; *Great Northern Ry. Co.* v. *Rimell*, 27 L. J. C. P. 201; 18 C. B. 575.) As to what articles are within the Act, see *Bernstein* v. *Baxendale*, 28 L. J. C. P. 265; 6 C. B. N. S. 251.

The sender of the goods having declared their value in accordance with the statute, it lies upon the carrier to demand the increased charge; and if he accepts the goods without such demand he is liable for loss or injury to them, although the increased charge is not tendered or paid. (*Behrens* v. *Great Northern Ry. Co.*, 6 H. & N. 366; 30 L. J. Ex. 153; 31 L. J. Ex. 299.)

Western Ry. Co., 10 Ex. 793; *Stoessiger* v. *South-Eastern Ry. Co.*, 2 E. & B. 549; *Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615; 28 L. J. Ex. 385; *Behrens* v. *Great Northern Ry. Co.*, 30 L. J. Ex. 153.

Replication to the Plea of the Carriers Act that the Loss was occasioned by the Felonious Acts of the Defendants' Servants (1 *Wm. IV. c.* 68, *s.* 8) (*a*).

That the loss of the said goods in the declaration mentioned arose from the felonious acts of servants in the employ of the defendant, and not otherwise.

Like replications: Boyce v. *Chapman*, 2 Bing. N. C. 222; *Machu* v. *South-Western Ry. Co.*, 2 Ex. 417; *Metcalfe* v. *London and Brighton Ry. Co.*, 27 L. J. C. P. 205, 333; 4 C. B. N. S. 307.

Plea of a special contract repudiating liability for loss or damage unless the goods were declared and insured according to their value: Wyld v. *Pickford*, 8 M. & W. 443 (*b*).

A replication to the above plea, that the goods were lost by the negligence of the defendant (*see note* (*a*), *infra*): *Wyld* v. *Pickford*, *supra*; *Phillips* v. *Clark*, 26 L. J. C. P. 168.

Plea to an action against a railway company for losing goods left at the cloak-room of a station, that the defendants accepted the goods upon a condition that they would not be responsible for the same if the value exceeded £10, which it did: Van Toll v. *South-Eastern Ry. Co.*, 31 L. J. C. P. 241. [*The Railway and Canal Traffic Act*, 1854 (*see note* (*c*), *infra*), *does not apply in this case: Ib.*]

Plea by a Railway Company of a Special Condition exempting the Defendants from liability (*c*).

That the said goods were delivered by the plaintiff to the defen-

(*a*) Under the statute the carrier is liable for the felonious acts of his servants, whether arising from his own negligence or not, and a replication of the felony, as above, is sufficient; whereas under a special contract made at common law, restricting his liability as an insurer, the carrier is only liable for the felonious acts of his servants as resulting from his own negligence, and the replication should charge that the loss arose from the negligence of the defendant. (*Metcalfe* v. *London and Brighton Ry. Co.*, 27 L. J. C. P. 205; 4 C. B. N. S. 307; *Great Northern Ry. Co.* v. *Rimell*, 27 L. J. C. P. 201; 18 C. B. 575.) Where a carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier within the meaning of the statute. (*Machu* v. *London and South-Western Ry. Co.*, 2 Ex. 415.)

(*b*) Where the defence of a special contract is relied on, if the declaration alleges the terms of the contract or bailment in a form inconsistent with the real facts, a traverse of the allegation is in general sufficient (*Brind* v. *Dale*, 2 M. & W. 775; *White* v. *Great Western Ry. Co.*, 2 C. B. N. S. 7; *Peek* v. *North Staffordshire Ry. Co.*, 29 L. J. Q. B. 97); but if the declaration is general in its terms, a special plea of the condition qualifying them may be necessary. If the contract is within the Railway and Canal Traffic Act, it must satisfy the conditions of that statute (see the next note).

(*c*) The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. *c.* 32, *s.* 7,

dants, and were received by them to be carried as aforesaid under a special contract between the plaintiff and defendants signed by the plaintiff, and subject to certain just and reasonable conditions contained in the said contract, one of which conditions was [that the defendants would not be answerable for the loss or detention of any

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enacts that every railway company and canal company "shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any such animals, beyond the sums hereinafter mentioned; (that is to say) for any horse, £50; for any neat cattle, per head, £15; for any sheep or pigs, per head, £2; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of a higher value than as above-mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. and 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act, 11 Geo. IV. and 1 Will. IV. c. 68, with respect to articles of the descriptions mentioned in the said Act" (see *ante*, p. 470, n. (*a*)).

Under the above statute a condition that "No claim for deficiency, damage, or detention will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within seven days of the time they should have been delivered," was held reasonable (*Lewis* v. *Great Western Ry. Co.*, 5 H. & N. 867); so was a condition "That the company will not be answerable for the loss or detention of any goods which may be untruly or incorrectly described in the receiving note." (Ib.) A condition that the company should not be responsible for the loss of or injury to certain articles specified unless declared and insured according to their value, was held reasonable. (*Peek* v. *North Staffordshire Ry. Co.*, 27 L. J. Q. B. 465; 29 L. J. Q. B. 97.) A condition that the company would not be liable for animals above a certain value unless the value was declared, and an increased charge of 2½ per cent. upon the declared value was paid, whatever distance the animal was to be carried, was held reasonable. (*Harrison* v. *London and Brighton Ry. Co.*, in error, Wilde, B., *dissentiente*, 31 L. J. Q. B. 113;

goods which might be untruly or incorrectly described in the receiving note delivered by the plaintiff to the defendants]; and [at the time of the delivery of the said goods to the defendants the plaintiff delivered to them a receiving note purporting to contain a true and correct description of the said goods, and the defendants received

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reversing the judgment of the Queen's Bench, 29 L. J. Q. B. 209.) A condition that in carrying fish the company would not be responsible under any circumstances for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud, and that fish would be carried by certain specified trains, subject in all cases to the immediate convenience and arrangements of the company, was held reasonable. (*Beal* v. *South Devon Ry. Co.*, 5 H. & N. 875.) A condition "That the company would not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train," was held reasonable. (*White* v. *Great Western Ry. Co.*, 2 C. B. N. S. 7.) A condition that in carrying cattle and live-stock the company was to be held free from all risk or responsibility in respect of any loss or damage arising on the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any other cause whatsoever, and that the company was not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market, was held reasonable. (*Pardington* v. *South Wales Ry. Co.*, 1 H. & N. 392.)

But it has been held that a condition that the owners of live stock should undertake all risks of conveyance, loading and unloading whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon their railway or in their vehicles, was unreasonable. (*M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 28 L. J. Ex. 353.) So a condition that horses were to be carried entirely at the owner's risk was held to be unreasonable. (*M'Cance* v. *London and North-Western Ry. Co.*, 31 L. J. Ex. 65.) And a condition that the company should not be liable for the loss, detention, or damage of any package insufficiently or improperly packed, was held to be unreasonable. (*Simons* v. *Great Western Ry. Co.*, 18 C. B. 805; *Garton* v. *Bristol and Exeter Ry. Co.*, 30 L. J. Q. B. 273.)

The decision of the judge at *nisi prius* as to the reasonableness of conditions may be reviewed by the court. (*Lewis* v. *Great Western Ry. Co.*, 5 H. & N. 867; *Beal* v. *South Devon Ry. Co.*, 5 H. & N. 875, 885.)

The reasonable percentage upon the excess of the declared value of animals above the sums mentioned in the section is a question for the jury, and is not referred to the court or judge under the preceding proviso of the section. (*Harrison* v. *London and Brighton Ry. Co.*, 31 L. J. Q. B. 113, 119.)

It has been decided in the Court of Exchequer Chamber, after a conflict of decisions in the Courts below, that the above provision restraining companies from making any conditions except such as are reasonable, extends not only to the notices and declarations, but also to the special contracts mentioned in the section. (*M'Manus* v. *Lancashire and Yorkshire Ry. Co.*, 28 L. J. Ex. 353.) It has been said, also, that the statute only applies in cases of loss or injury occasioned by misconduct on the part of the company, and not to cases of accidental loss or injury in respect of which they are charged merely as insurers. (*Harrison* v. *London and Brighton Ry. Co.*, 31 L. J. Q. B. 113, 114.) The Act does not apply to the receiving of goods by railway companies at their stations for safe custody and redelivery to the owners, and not for forwarding or carriage. (*Van Toll* v. *South-Eastern Ry. Co.*, 31 L. J. C. P. 241.)

the said goods from the plaintiff upon the faith of the said description; and the said goods were not truly and correctly described in the said receiving note, and were without the defendant's knowledge or consent misdescribed in the said receiving note] within the meaning of the said condition.

Like pleas: Lewis v. *Great Western Ry. Co.*, 5 H. & N. 867; *Peek* v. *North Staffordshire Ry. Co.*, 27 L. J. Q. B. 465; 29 L. J. Q. B. 97; *Beal* v. *South Devon Ry. Co.*, 5 H. & N. 875; *Pardington* v. *South Wales Ry. Co.*, 1 H. & N. 392; *White* v. *Great Western Ry. Co.*, 2 C. B. N. S. 7.

Plea by a carrier by sea of a special contract repudiating liability for loss or damage: Phillips v. *Clark*, 2 C. B. N. S. 156; 26 L. J. C. P. 168; *Phillips* v. *Edwards*, 28 L. J. Ex. 52.

Plea that the goods were received to be carried on the terms that the defendants should not be liable unless bills of lading were signed, which was not done: Wilton v. *Royal Atlantic Mail Steam Nav. Co.*, 30 L. J. C. P. 369; 10 C. B. N. S. 453.

Plea under the Merchant Shipping Act (17 & 18 *Vict. c.* 104, *s.* 503), *that the nature and value of the goods were not declared: Williams* v. *African Steamship Co.*, 26 L. J. Ex. 69; 1 H. & N. 300.

Plea by Carriers that the Breach was caused by the Plaintiff's own Act and Default.

That when the said goods were delivered to and accepted by the defendants as alleged, the same were by the negligence and default of the plaintiff, and without any default of the defendants, or any notice or knowledge thereof to or by them, [improperly and insufficiently packed and secured]; and the defendants were prevented from safely and securely carrying and delivering the said goods as they otherwise would have done, and the same were not delivered to the plaintiff, and were wholly lost to him as alleged by and through his own negligence and default in that behalf and not otherwise.

Plea by a carrier of stoppage in transitu by an unpaid consignor: Jones v. *Jones*, 8 M. & W. 431; *Sheridan* v. *New Quay Co.*, 28 L. J. C. P. 58; 4 C. B. N. S. 618.

Plea that the damage was caused by the goods being of a dangerous description, which the plaintiff well knew, but of which he gave no notice to the defendant: Hutchinson v. *Guion*, 28 L. J. C. P. 63; 5 C. B. N. S. 149; *and see Alston* v. *Herring*, 25 L. J. Ex. 177; 11 Ex. 822; *Farrant* v. *Barnes*, 31 L. J. C. P. 137.

Plea that the delay was caused by the line being blocked up by a fall of snow: Briddon v. *Great Northern Ry. Co.*, 28 L. J. Ex. 51.

Plea that the defendant carried the goods and offered to deliver them upon payment of the carriage, which the plaintiff refused to pay. Replication that within a reasonable time after such refusal the plaintiff tendered the carriage and demanded the goods, but the defendant refused to deliver them: Crouch v. *Gt. Western Ry. Co.*, 26 L. J. Ex. 418; 27 L. J. Ex. 345; 2 H. & N. 491.

CHAMPERTY. See *post*, "*Maintenance.*"

CHARTERPARTIES.

General Issue (*a*).

"Non assumpsit," *ante*, *p.* 401; "Non est factum," *ante*, *p.* 403.

That the Defendant, the Charterer, did load a complete Cargo.

That he did, within a reasonable time after the arrival of the said ship at ——, load her there with a full cargo according to the said charterparty.

Pleas to Actions for not Loading:

Of delay in the arrival of the vessel at the port of loading, whereby the defendant, the charterer, lost the object of the voyage: *Clipsham* v. *Vertue*, 5 Q. B. 265.

That, by the negligence of the master, the ship was damaged and unfit to receive a cargo: *Taylor* v. *Clay*, 9 Q. B. 713.

Of excuse on the ground that the ship exceeded in size the description in the charterparty: *Windle* v. *Barker*, 25 L. J. Q. B. 349. *Of excuse by reason of a breach of warranty of the rating of the ship:* *Hurst* v. *Usborne*, 25 L. J. C. P. 209; 18 C. B. 144. [*A warranty of the state of the ship in the charterparty does not warrant a continuance of that state during the voyage:* ib.]

That the Defendant, the Charterer, did not keep the Ship on Demurrage.

That he did not keep the said ship on demurrage as alleged.

That the Defendant, the Charterer, did not detain the Ship.

That he did not detain the said ship beyond the periods agreed upon in the said charterparty for loading and discharging and demurrage, as alleged.

(*a*) The general issue denies the making of the charterparty; and the form of *non assumpsit* or *non est factum* is applicable according to whether the instrument is a simple contract or a deed.

The breaches should be denied by specific traverses in the terms of the breaches alleged in the declaration, as in the above forms.

It has been held that in an action against the owner, if he relies upon any exceptions in the charterparty, he must plead that he comes within them; and the plaintiff need not negative this in the declaration. (*Wheeler* v. *Bavidge*, 9 Ex. 668.) But see, as to pleading provisions and exceptions, *Dawson* v. *Wrench*, 3 Ex. 359; *Brown* v. *Knill*, 2 B. & B. 395; 1 Chit. Pl. 7 ed. 317.

That the Defendant, the Owner, was prevented from completing the Voyage by Causes excepted in the Charterparty.

That the defendant was prevented from completing the said voyage by perils and casualties excepted in the said charterparty, that is to say, by the dangers and accidents of the seas, rivers, and navigation.

A like plea: Schilizzi v. *Derry*, 4 E. & B. 875.

Plea that the defendant was prevented from loading by restraint of rulers within the exception in the charterparty: Barrick v. *Buba*, 2 C. B. N. S. 563; *Bruce* v. *Nicolopulo*, 11 Ex. 129.

That a Declaration of War rendered the Performance of the Charterparty illegal.

That after the making of the said charterparty, and before the alleged breach thereof, war was declared and proclaimed by her Majesty Queen Victoria against the Emperor of Russia, and this kingdom and the empire of Russia then began and at the time of the alleged breach continued to be at war with one another, of which the plaintiff and defendant then had notice; and at the time of the alleged breach the plaintiff and the defendant were subjects of and owed allegiance to her said Majesty, and the said ship was a British ship registered according to law in that behalf, and the said port of —— was part of the said empire of Russia, and no license from her said Majesty was obtained for loading any cargo on board the said ship at the said port, and the defendant could not then have loaded the said ship as agreed upon, nor could the plaintiff then have procured and shipped such cargo as agreed upon without trading and corresponding with the subjects of the said Emperor of Russia, so being at war with this kingdom as aforesaid.

Like pleas: Avery v. *Bowden*, 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; 5 E. & B. 714; *Reid* v. *Hoskins*, 25 L. J. Q. B. 55; 4 E. & B. 981; 5 E. & B. 729; *Esposito* v. *Bowden*, 27 L. J. Q. B. 17; 4 E. & B. 963; *Barrick* v. *Buba*, 2 C. B. N. S. 563.

Checks.

See the pleas to bills and notes: *ante*, p. 446.

Circuity of Action (*a*).

See pleas in avoidance of circuity of action, "*Bills*," *ante*, *p.* 455.

(*a*) *Circuity of action.*]—Wherever the rights of the litigant parties are such that the defendant would be entitled to recover back from the plaintiff the same sum which the plaintiff seeks to recover, the defendant may plead the facts which constitute such right as a defence, in order to avoid circuity of action. (*Turner* v. *Davies*, 2 Wms. Saund. 150; *Charles* v. *Altin*, 23 L. J. C. P. 197; 15 C. B. 46.) A claim for unliquidated damages cannot be so pleaded, where the measure of damages is not necessarily identical in

COMPANY.

General Issue (*a*).

"Never indebted," *ante*, p. 397.

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both cases. (*Charles* v. *Altin*, 23 L. J. C. P. 197; 15 C. B. 46; *Minshull* v. *Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194; *Alston* v. *Herring*, 25 L. J. Ex. 177; *Jackson* v. *Isaacs*, 3 H. & N. 405; where see pleas deficient in these respects.) Nor can a mere cross-claim for unliquidated damages be pleaded as a defence on equitable grounds. (*Stimson* v. *Hall*, 1 H. & N. 831; *Atterbury* v. *Jarvie*, 2 H. & N. 114; *Minshull* v. *Oakes*, 2 H. & N. 793.)

A covenant or agreement not to sue for the same cause of action may be pleaded in bar to avoid circuity of action. It operates between the parties to the covenant or agreement as a release of the cause of action, and the covenant may be so pleaded. (See "*Release*," *post*; 2 Wms. Saund. 47 *g g*; *Ford* v. *Beech*, 11 Q. B. 852, 871.) But a covenant not to sue one of two joint debtors does not operate as a release of the other. (*Dean* v. *Newhall*, 8 T. R. 168; *Hutton* v. *Eyre*, 6 Taunt. 289; *Willis* v. *De Castro*, 27 L. J. C. P. 243; 4 C. B. N. S. 216); and a release in terms of one of two joint debtors, reserving all remedies against the other, amounts only to a covenant not to sue and not to a release. (*Willis* v. *De Castro*, *supra*.)

A covenant or agreement not to sue for a limited time cannot be pleaded. (*Thimbleby* v. *Barron*, 3 M. & W. 210; 2 Wms. Saund. 150 *a*.) But a covenant not to sue for a limited time, with a condition that if a suit be brought before the time the right shall be forfeited, operates as a bar by force of the condition, if the action be brought within the time; and may be pleaded in bar. (*Gibbons* v. *Vouillon*, 8 C. B. 483; *Belshaw* v. *Bush*, 11 C. B. 191, 202, 204.) So a bill taken for and on account of a debt is a conditional payment during the currency of the bill, and may be pleaded in bar to an action for the debt. (*Belshaw* v. *Bush*, *supra*; 2 Wms. Saund. 103 *b*, (*c*); and see *ante*, p. 464.) A contract of indemnity made by the plaintiff to the defendant in respect of the debt sued for may be pleaded as a defence on this ground, as where the plaintiff sued a provisional director of a company to whom he had given an indemnity from all liability in order to induce him to become such director. (*Connop* v. *Levy*, 11 Q. B. 769.) A covenant by the plaintiff not to sue the defendant for any debt due from him to the plaintiff, cannot be pleaded in bar of an action by the plaintiff and another for a debt due to them jointly. (*Walmesley* v. *Cooper*, 11 A. & E. 216; 2 Wms. Saund. 150 *a*, (*k*).) In an action by three joint payees of a promissory note against one of several makers, a plea that one of the plaintiffs was also one of the makers, and therefore would be bound to contribute to the defendant his share of what was recovered, was held a bad plea, and could not be supported as a defence to that portion of the claim on the ground of avoiding circuity of action. (*Beecham* v. *Smith*, 27 L. J. Q. B. 257.)

(*a*) By the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 26, a statutory form of declaration for calls is given. (See *ante*, p. 119.) By sect. 27 it is provided that "on the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any

Pleas traversing the incorporation of the company: Liverpool Borough Bank v. *Mellor*, 28 L. J. Ex. 78; 3 H. & N. 551.

Plea that the plaintiffs were a company established for other purposes besides insurance, and were not registered under the Joint Stock Companies Act, 1856, 20 & 21 *Vict. c.* 14, *s.* 27: *London Monetary Advance Co.* v. *Smith*, 27 L. J. Ex. 479; 3 H. & N. 543.

Plea that an insurance company was not registered under 7 & 8 *Vict. c.* 110: *Agricultural Cattle Ins. Co.* v. *Fitzgerald*, 16 Q. B. 432.

Plea to an action against a contributory, that the liquidators were

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such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year, had been made within that period."

It has been held that these matters are all put in issue by the plea of *never indebted*. Accordingly, pleas traversing that the defendant was holder of the shares, that the call was made, or that notice was given, that the defendant had forfeited his shares, and the like, are unnecessary. (*London and Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 135; *London and Brighton Ry. Co.* v. *Fairclough*, 6 Bing. N. C. 270; *South-Eastern Ry. Co.* v. *Hebblewhite*, 12 A. & E. 497.) Under this issue the defendant may show that he is not a shareholder *de jure*, notwithstanding the *primâ facie* evidence of the register. (*Shropshire Union Ry. Co.* v. *Anderson*, 3 Ex. 401.) A plea that before the call was payable the defendant transferred his shares to another, whereby he ceased to be a proprietor of the shares and to be liable to the call, was held to be merely an argumentative denial that the defendant was indebted. (*Aylesbury Ry. Co.* v. *Mount*, 7 M. & G. 898.)

By s. 9 of the above Act, it is provided that the company shall keep a book, called the "Register of Shareholders," in which shall be entered the names of the shareholders with the number of shares to which they are respectively entitled, distinguishing each share by its number, and the amount of subscriptions paid on such shares, and such book shall be authenticated by the seal of the company affixed thereto at an ordinary meeting.

And by s. 28, "the production of the register of shareholders shall be *primâ facie* evidence of the defendant being a shareholder, and of the number and amount of his shares."

The keeping and sealing of the register of shareholders, under s. 9, is not essential to constitute a person a shareholder (*Wolverhampton New Waterworks Co.* v. *Hawkesford*, 29 L. J. C. P. 121; 31 *Ib.* 184); but it seems that a person cannot be charged as a shareholder, unless specific shares are appropriated to him. (*Irish Peat Co.* v. *Phillips*, 30 L. J. Q. B. 114; 363.)

The Act for the Registration, Incorporation, and Regulation of Joint Stock Companies (7 & 8 Vict. c. 110, s. 55), contains similar provisions as to the declaration and evidence. There are no similar provisions in the Joint Stock Companies Acts, 1856, 1857. (See *ante*, p. 121.) But by "The Companies Act, 1862," 25 & 26 Vict. c. 89 (repealing the 7 & 8 Vict. c. 110, and the Joint Stock Companies Acts, 1856, 1857), s. 70, it is enacted that "In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member; it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other monies due, whereby an action hath accrued to the company.

To a declaration for calls by a company incorporated by a colonial Act, setting out the facts showing the liability of the defendant as a shareholder, the defendant may plead never indebted, and put in issue all the facts stated. (*Welland Ry. Co.* v. *Blake*, 6 H. & N. 410.)

The period of limitation for an action for calls under a statute is twenty

not duly appointed: Anglo-Californian Gold Mining Co. v. *Lewis*, 30 L. J. Ex. 50.

Plea to an action on a promissory note, that it was made by the defendants as the directors of a company, and was binding on the company only: Aggs v. *Nicholson*, 1 H. & N. 165; *Lindus* v. *Melrose*, 2 H. & N. 293.

Plea in an action on a covenant made with the plaintiff to pay calls, that they were due to a banking copartnership established under 7 Geo. IV. c. 46, *and that the public officer ought to sue: Chapman* v. *Milvain*, 5 Ex. 61.

Plea that the debt was due from the defendant as a member of a like banking copartnership, and that the public officer ought to be sued: Steward v. *Greaves*, 10 M. & W. 711.

Pleas in Actions by and against Incorporated Companies of Informality in the Contract.

Plea to an action on a contract under seal, that it was executed and sealed without the proper authority required for that purpose by the act of incorporation: Royal British Bank v. *Turquand*, 24 L. J. Q. B. 327; 25 Ib. 317; 6 E. & B. 327; *Prince of Wales Ass. Co.* v. *Harding*, 27 L. J. Q. B. 297; *Agar* v. *Athenæum Ass. Co.* 27 L. J. C. P. 95; 3 C. B. N. S. 725; *Curteis* v. *Anchor Ass. Co.* 27 L. J. Ex. 14; 2 H. & N. 537; *Balfour* v. *Ernest*, 28 L. J. C. P. 170. [*As to these defences, see Ernest* v. *Nicholls*, 6 H. L. C. 401.]

Pleas that the contract sued upon was not made according to the form required by the constitution of the company: Bill v. *Darenth Ry. Co.* 1 H. & N. 305.

Plea that the contract was by parol only, and not under the seal of the company: London Dock Co. v. *Sinnott*, 8 E. & B. 347.

Pleas that the contract made was beyond the powers of the company: Bateman v. *Ashton-under-Lyne*, 27 L. J. Ex. 458; 3 H. & N. 323; *South Yorkshire Ry. Co.* v. *Great Northern Ry. Co.* 9 Ex. 55; *Hambro* v. *Hull Fire Ins. Co.* 28 L. J. Ex. 62; *Payne* v. *Mayor of Brecon*, 3 H. & N. 572; 27 L. J. Ex. 495.

Plea that the contract charged was in violation of the purposes of the company: South Wales Ry. Co. v. *Redmond*, 10 C. B. N. S. 675.

Plea to an action for calls that the calls made were in excess of

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years by the 3 & 4 Will. IV. c. 42 (*Cork and Bandon Ry. Co.* v. *Goode*, 13 C. B. 826); but it seems that an action for calls under a foreign or colonial statute is founded on a simple contract, and the period of limitation is six years by 21 Jac. I. c. 16 (*Welland Ry. Co.* v. *Blake*, 30 L. J. Ex. 161). Calls made under the winding up Act to liquidate the debts of the company are simple contract debts. (*Re Royal Bank of Australia*, 26 L. J. C. 95.)

those empowered to be made: Welland Ry. Co. v. *Berrie*, 30 L. J. Ex. 163; 6 H. & N. 416.

Plea that the defendant subscribed for shares on the terms that a proposed amount of capital should be subscribed for, and that the capital was not all subscribed for: London and Continental Ass. Co. v. *Redgrave*, 4 C. B. N. S. 524.

Plea that the contract was made by the defendants as promoters of a joint-stock company before provisional registration on behalf of the company, contrary to 7 & 8 Vict. c. 110, ss. 23, 24; Bull v. *Chapman*, 8 Ex. 444; *Job* v. *Lamb*, 11 Ex. 539.

A like plea, together with a plea under 10 & 11 Vict. c. 78, s. 7: Abbot v. *Rogers*, 16 C. B. 277.

Plea by a company that the plaintiff was a director of the company at the time of making the contract sued on, and was interested therein, see 7 & 8 Vict. c. 110, s. 29: Stears v. *South Essex Gas Co.*, 9 C. B. N. S. 180; 30 L. J. C. P. 49.

Composition taken for the Debt.

Plea that the Defendant paid a Composition for the Debt, under an Agreement with the Plaintiff and his other Creditors.

That he was indebted to the plaintiff as alleged and to divers other persons respectively; and it was thereupon mutually agreed by and between the defendant and the plaintiff and the said other persons, that the defendant should pay to the plaintiff and the said other persons respectively, and that the plaintiff and the said other persons respectively should accept from the defendant a composition at the rate of —— shillings in the pound on their respective debts, in full satisfaction and discharge of their said respective debts; and the defendant afterwards, in pursuance of the said agreement, paid to the plaintiff, and the plaintiff accepted and received from the defendant, the said composition on the said debt of the plaintiff in full satisfaction and discharge of the said debt.

Like pleas: Reay v. *Richardson*, 2 C. M. & R. 422; *Jones* v. *Senior*, 4 M. & W. 123; *Matthews* v. *Taylor*, 2 M. & G. 667; *Rosling* v. *Muggeridge*, 16 M. & W. 181; *Boyd* v. *Hind*, 1 H. & N. 938; 26 L. J. Ex. 164.

A like plea, concluding with a tender of the amount of the composition, and payment of the amount into court: Norman v. *Thompson*, 4 Ex. 755; [*payment into court of the composition without tender according to the agreement would not be sufficient: Hazard* v. *Mare*, 30 L. J. Ex. 97; *and see Cooper* v. *Phillips*, 1 C. M. & R. 649, *where a plea alleging a waiver of payment of the composition was held bad.*]

Conditions Precedent (*a*).

Plea averring a Condition Precedent and denying the Performance of it.

That the alleged agreement [*if it was one which must necessarily have been in writing in order to be valid, and it is not stated in the declaration to have been so, add,* was reduced into writing, and signed by the plaintiff and the defendant respectively, and] was made subject to certain terms or conditions then agreed on by and between the plaintiff and the defendant [*if it was in writing add,* and contained therein] that is to say, upon the terms or conditions [that the said goods should be made according to certain patterns to be furnished by the plaintiff to the defendant and not otherwise, and that the plaintiff should furnish the same to the defendant in a reasonable time in that behalf to enable the defendant to perform the said agreement on his part, *or as the case may be*]; and the plaintiff did not [furnish the said patterns or any of them in a reasonable time in that behalf to enable the defendant to perform the said agreement, *or as the case may be*], and the defendant was prevented from performing the said agreement on his part, by the said neglect and default of the plaintiff.

Conviction. See "*Attainder*," *ante*, p. 430.

(*a*) The general averment of the performance of conditions precedent may be used, when necessary, in pleas and subsequent pleadings as well as in declarations, see *ante*, p. 124. The opposite party cannot, in the plea or replication or other pleading, deny this general averment generally, but must specify in his plea, etc., the condition or conditions precedent the performance of which he intends to contest. (Ib.)

The denial of the performance of each condition precedent must be pleaded in a separate plea. The plea should be framed precisely as a specific traverse would be, supposing the performance of the condition were specifically alleged in the declaration; but the words "as alleged," which frequently conclude a traverse of an express averment, are usually omitted.

The declaration sometimes improperly omits to state some of the conditions precedent arising out of a contract, merely alleging that it was agreed by and between the plaintiff and the defendant "upon certain terms and conditions therein mentioned," etc., and then avers generally the performance of all conditions precedent, involving therein the unexpressed conditions. In such a case the defendant is obliged in his plea to allege expressly the condition on which he relies as forming part of the contract, in order to enable him to deny its performance or fulfilment, as in the above form. (*Beal* v. *South Devon Railway Co.*, 29 L. J. Ex. 441.) If the defendant is unwilling to take upon himself to determine whether the supposed condition is material or not, the safest course is to set out the whole of the contract, or the part on which he relies, *in hæc verba*, and then add the denial of the performance of the condition.

As to what are conditions precedent and the rules for determining the construction of contracts in this respect, see the notes to *Pordage* v. *Cole*, 1 Wms. Saund. 319 *l*; and *Cutter* v. *Powell*, 2 Smith L. C. 5th ed. 1.

Coverture.

See "*Abatement*," *ante*, p. 408; "*Husband and Wife*," *post*, p. 510.

Drunkenness (*a*).

Plea that the Defendant was Intoxicated at the time of Contracting.

That at the time when the defendant made the alleged promise [*or* agreement, *or* executed the alleged deed, *or*, *to an indebitatus count*, contracted the alleged debt], he was so intoxicated, and under the influence of liquor, and thereby so entirely deprived of the use of his reason, that he was unable to comprehend the meaning or effect of the said promise [*or* agreement, *or* deed, *or* contract], or to contract thereby, as the plaintiff then well knew.

Like pleas: Gore v. *Gibson*, 13 M. & W. 623; *Hamilton* v. *Grainger*, 5 H. & N. 40.

Duress (*b*).

Plea that the Defendant was induced to contract by Duress of Imprisonment.

That he was induced to make the alleged promise [*or* agreement, *or* to execute the alleged deed, *or*, *to an indebitatus count* to contract the alleged debt] by duress of the plaintiff, that is to say, by the plaintiff unlawfully imprisoning him and detaining him in prison until he made the said promise [*or* agreement, *or* executed the said deed, *or* contracted the alleged debt].

A like plea by the acceptor of a bill: Stephens v. *Underwood*, 4 Bing. N. C. 655.

(*a*) A contract may be avoided on the ground that the party making it was at the time incapable of contracting from intoxication, to the knowledge of the other party. (*Gore* v. *Gibson*, 13 M. & W. 623; *Molton* v. *Camroux*, 2 Ex. 487, 501; and see *post*, "*Insanity*.") Under such circumstances a person may become liable for necessaries supplied to him, and also for goods supplied to him which he retains after becoming sober: Ib. The defence must be specially pleaded. (*Gore* v. *Gibson*, *supra*; r. 8, T. T. 1853.)

(*a*) The defence that the contract was procured by duress must be specially pleaded. (*Whelpdale's case*, 5 Co. Rep. 119; and see r. 8, T. T. 1853.) Duress consists in illegal imprisonment (2 Inst. 483; *Cumming* v. *Ince*, 11 Q. B. 112), or threats calculated to produce fear of loss of life, or of bodily harm. (2 Inst. 483.)

The illegal taking and detaining of goods, or threats of injury to goods, do not constitute duress sufficient to avoid a contract (*Skeate* v. *Beale*, 11 A. & E. 989), although money paid under such circumstances, in order to recover possession of the goods or to preserve them, may be recovered as money received to the plaintiff's use, on the ground of its having been paid without any legal consideration. (Ib.; *Atlee* v. *Backhouse*, 3 M. & W. 633; and see *ante*, p. 41.)

Plea that the Defendant was induced to contract by Duress of Threats.

That he was induced to make the alleged promise [*or* agreement, *or* to execute the alleged deed, *or to an indebitatus count* to contract the alleged debt] by duress of the plaintiff, that is to say, by the plaintiff threatening the life of [*or* to do bodily harm to] the defendant unless he would make [*or* execute, *or* contract] the same, and the defendant then made the said promise [*or* agreement, *or* executed the said deed, *or* contracted the alleged debt] in fear that the said threats would be immediately carried into execution and to preserve his life [*or* to avoid the said bodily harm].

Equitable Pleas, Replications, etc. (*a*).

See "*Commencements of Pleas, etc.*," *ante*, pp. 387, 393.

Plea on equitable grounds, to an action against one of several joint makers of a promissory note, that the defendant made the note as surety only for another maker to whom the plaintiff gave time: see ante, "*Bills of Exchange*," p. 459.

(*a*) *Pleadings on equitable grounds.*]—The C. L. P. Act, 1854, s. 83, enacts that "it shall be lawful for the defendant or plaintiff in replevin, in any cause in any of the superior courts, in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words, 'For defence on equitable grounds,' or words to the like effect."

By s. 84, "any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audità querelâ*."

By s. 85, "the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words, 'For replication on equitable grounds,' or words to the like effect."

And by s. 86, "in case it shall appear to the court or any judge thereof that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out on such terms as to costs and otherwise as to such court or judge may seem reasonable."

The above sections 83, 85, seem to enable a party to plead a single plea or replication on equitable grounds without the leave of the court; but if it is proposed to plead it with other matters, leave must be obtained, which is a matter of discretion for the court to grant or refuse. (*Atterbury* v. *Jarvie*, 26 L. J. Ex. 178; 2 H. & N. 114.) If the equity of the matter is arguable, the court will allow the plea, in order that the question may be raised on demurrer, and if necessary taken to a court of error. (*Burgoyne* v. *Cottrell*, 24 L. J. Q. B. 28; *Chilton* v. *Carrington*, 24 L. J. C. P. 153; *Elliott* v. *Mason*, 26 L. J. Ex. 175.) If the matter of the plea amounts to an answer at law, it will not in general be allowed to be pleaded as an equitable defence. (*Drain* v. *Harvey*, 25 L. J. C. P. 81; 17 C. B. 257.) It has been questioned whether a plea pleaded expressly on equitable grounds, and

Plea on equitable grounds, that the defendant was surety only to the plaintiff for a third person, and that the plaintiff negligently lost the benefit of a security he had against the principal debtor: Mutual Loan Ass. v. *Sudlow*, 28 L. J. C. P. 108; 5 C. B. N. S. 449.

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which cannot be supported as an equitable defence, can be supported as a defence at common law. (See per Bramwell, B., *Teed* v. *Johnson*, 25 L. J. Ex. 110, 111; *Vorley* v. *Barrett*, 26 L. J. C. P. 1; 1 C. B. N. S. 225; *Minshull* v. *Oakes*, 27 L. J. Ex. 194; 2 H. & N. 793; *Sloper* v. *Cottrell*, 26 L. J. Q. B. 7.) It seems that where a previous pleading is on equitable grounds, all the subsequent pleadings, except traverses, must of necessity be on equitable grounds. (Per Willes, J., *Vorley* v. *Barrett*, *supra*.)

Equitable replications will not be allowed which are inconsistent with the legal right alleged in the declaration. (*Hunter* v. *Gibbons*, 26 L. J. Ex. 1; 1 H. & N. 459; *Reis* v. *Scottish Equitable Life Ass. Co.*, 26 L. J. Ex. 279; 2 H. & N. 19.) Thus, in an action of trespass for digging minerals under the plaintiff's land, the defendant pleaded the Statute of Limitations, and the court refused to allow a replication that the trespasses were fraudulently concealed until within six years, because it showed that the legal right was barred, and the only right, if any, was a right in equity for an account. (*Hunter* v. *Gibbons*, 26 L. J. Ex. 1; 1 H. & N. 459.) So in an action against an executor for goods sold to the testator, a replication on equitable grounds to a plea of the Statute of Limitations that the causes of action accrued within six years before the testator's death, and that he bequeathed to the defendant sufficient money on trust to pay his debts, was held bad on demurrer. (*Gulliver* v. *Gulliver*, 25 L. J. Ex. 341; 1 H. & N. 174.) So, in an action for goods sold, a replication on equitable grounds to a plea of infancy, that the defendant induced the plaintiff to supply the goods by fraudulently representing himself of full age, was held bad. (*Bartlett* v. *Wells*, 31 L. J. Q. B. 57.) So where the declaration charged a contract under seal for building a ship, stipulating that all alterations should be ordered in writing, and averred a discharge of this stipulation, and claimed for alterations, and the defendant pleaded that the discharge was not under seal, a replication on equitable grounds that the discharge was under a parol agreement, was held bad as contradicting the declaration. (*Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169.) These replications are objectionable, both as being departures from the declaration and as setting up matter for a suit in equity instead of a cause of action at law. (See per Crompton, J., *Bartlett* v. *Wells*, 31 L. J. Q. B. 57.)

But an equitable replication answering an equitable plea which admits a legal cause of action seems to be sufficient. (*Sloper* v. *Cottrell*, 26 L. J. Q. B. 7.) So, an equitable replication may be pleaded in support of an equitable claim enforced through a legal trustee; as where an assignor of a debt sued as trustee for the assignee, and the debtor pleaded a discharge by the assignor, a replication that the discharge was collusive between the defendant and the nominal plaintiff was allowed. (*De Pothonier* v. *De Mattos*, 27 L. J. Q. B. 260.)

A plea or replication on equitable grounds must be founded on a matter depending upon the principles of equity, and not upon the practice of the equity courts. (*Phelps* v. *Prothero*, 25 L. J. C. 105.)

Equity to injunction.]—An injunction in equity may be temporary or perpetual, total or partial, qualified or unconditional. (Story's Eq. Jur. ss. 873, 885.) But the courts of law will allow pleadings upon equitable grounds only where by the judgment at law they can do complete and final justice and settle all the equities between the parties. They have no jurisdiction to pronounce a temporary or conditional judgment, and no process by which terms or conditions can be enforced. Accordingly, they will allow

Plea on equitable grounds, to an action on a bond of guarantee, that the defendant executed the bond on the faith that no advances were to be made beyond the amount guaranteed and that greater advances were made: Gordon v. *Rae*, 27 L. J. Q. B. 185; 8 E. & B. 1065.

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a pleading on equitable grounds only where a court of equity under similar circumstances would decree an absolute, unconditional, and perpetual injunction. (*The Mines Royal Societies* v. *Magnay*, 24 L. J. Ex. 7; 10 Ex. 489; *Phelps* v. *Prothero*, 24 L. J. C. P. 225; *Wodehouse* v. *Farebrother*, 25 L. J. Q. B. 18; 5 E. & B. 277; *Wood* v. *The Copper Miners Co.*, 25 L. J. C. P. 166; 17 C. B. 561; *Clark* v. *Laurie*, 26 L. J. Ex. 38; *Drain* v. *Harvey*, 17 C. B. 257; *Gee* v. *Smart*, 8 E. & B. 313, 319.)

Thus, to an action on a covenant in a lease for rent and for not repairing, a defence on equitable grounds of a part-performed agreement to surrender was not allowed to be pleaded, because in equity the defendant would be entitled to an injunction only upon the terms of executing a surrender (*Mines Royal Societies* v. *Magnay*, 24 L. J. Ex. 7; 10 Ex. 489). To a plea setting up a title under a conveyance by way of mortgage, an equitable replication that the mortgage debt had been paid off was not allowed, because the court could not compel a reconveyance. (*Gorely* v. *Gorely*, 1 H. & N. 144.) Where to an action on a bond executed by the defendant as a surety the defendant pleaded, for an equitable defence, that he was willing to pay upon having the securities which the plaintiff held against the principal debtor delivered up to him, which the plaintiff refused, the plea was held bad on demurrer, as showing an equity to an injunction only upon conditions which the court could neither determine nor enforce. (*Wodehouse* v. *Farebrother*, 25 L. J. Q. B. 18; 5 E. & B. 277.)

A plea on equitable grounds of the pendency of an arbitration under an agreement that the terms on which the contract sued on should be put an end to should be referred to an arbitrator and that no action should be brought, was held bad on demurrer, because it only showed an equity to a temporary injunction until the arbitration was concluded or went off. (*Wood* v. *Copper Miners' Co.*, 25 L. J. C. P. 166; 17 C. B. 561.) In an action on a bill of exchange, the court refused leave to plead by way of an equitable defence that the bill was accepted on the terms that the plaintiff would renew from time to time until the defendant could pay, upon payment by him of a certain rate of discount, because the court could not compel the defendant to perform his part of the agreement. (*Flight* v. *Gray*, 27 L. J. C. P. 13; 3 C. B. N. S. 320.)

Mistake.]—A mistake in a transaction which would be rectified in equity, cannot in general be relied on as ground for an equitable pleading; because a court of law cannot apply the same complete remedy. Thus, leave was refused for a plea on equitable grounds that the defendant signed a written contract under a mistake as to its contents; because the remedy in equity would be by reforming the contract. (*Perez* v. *Oleaga*, 25 L. J. Ex. 65; 11 Ex. 506; *Solvency Mutual Guarantee Society* v. *Freeman*, 7 H. & N. 17; 31 L. J. Ex. 197.) A replication on equitable grounds that a release by deed was executed in mistake of its legal effect was held bad on demurrer for the same reason. (*Teed* v. *Johnson*, 25 L. J. Ex. 110.) So a plea on equitable grounds that the defendant accepted a bill under a mistake as to the date was not allowed. (*Drain* v. *Harvey*, 25 L. J. C. P. 81; 17 C. B. 257.)

But where the mistake consisted in making the defendant liable at all, as where it was intended that he should sign as agent only, so as to bind his principal, but not, as he did, in terms binding on himself, the mistake may be set up in an equitable plea, as equity would discharge him wholly from the contract. (*Wake* v. *Harrop*, 30 L. J. Ex. 273.) And where a contract containing a mistake in the terms has been completely executed according

Plea on equitable grounds, to an action on a guarantee for the completion of work by a third person for the plaintiff, that the plaintiff had contracted with the third person that he would insure the work during its progress, which he omitted to do, and the work was

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to the terms intended by the parties, the mistake may be relied upon as matter for an equitable plea or replication; because no object would be served by reforming the contract. (*Steele* v. *Haddock*, 24 L. J. Ex. 78; 10 Ex. 643; *Luce* v. *Izod*, 25 L. J. Ex. 307; 1 H. & N. 245.) Thus to an action for the conversion of goods, the defendant was allowed to plead for an equitable defence that the goods had been sold to him, but omitted by mistake in the broker's bought-and-sold notes, and that the purchase-money had been paid. (*Steele* v. *Haddock*, 24 L. J. Ex. 78; 10 Ex. 643.) So in an action against a surety, to which the defendant pleaded the discharge of the principal, a replication on equitable grounds that the discharge was by an agreement which was worded by mistake to include the present claim, and that the true agreement had been performed, was held good on demurrer. (*Vorley* v. *Barrett*, 26 L. J. C. P. 1; 1 C. B. N. S. 225.) A replication on equitable grounds to a plea of release, that the release was worded by mistake to include the present claim, is good. (*Lyall* v. *Edwards*, 6 H. & N. 337; 30 L. J. Ex. 193.)

A plea on equitable grounds, to an action for not delivering goods sold, that the sale was by sample, and a wrong sample was shown by the vendor by mistake, was held bad. (*Scott* v. *Littledale*, 27 L. J. Q. B. 201.)

An equitable plea of an innocent misrepresentation inducing the contract sued upon, was held bad. (*Gorsuch* v. *Cree*, 8 C. B. N. S. 574; 29 L. J. C. P. 308.)

Variations of agreements in writing.]—A written agreement cannot be varied by extrinsic evidence in equity or at law; and a pleading on equitable grounds having this object will not be allowed. Thus in an action on a life-policy, to a plea that the party assured travelled beyond Europe contrary to the terms of the policy, the court refused leave to the plaintiff to reply on equitable grounds that the policy was made upon the express agreement that the assured might go out of Europe without vitiating the policy. (*Reis* v. *Scottish Equitable Ass. Co.* 26 L. J. Ex. 279; 2 H. & N. 19.) But a replication upon equitable grounds, asserting that the plaintiff effected a life-policy upon the faith of a prospectus published by the insurers that all policies should be indisputable except in case of fraud, was held good. (*Wood* v. *Dwarris*, 25 L. J. Ex. 129; 11 Ex. 493.) The last decision seems at variance with that previously cited. It was incidentally objected to by the majority of the Court of Queen's Bench in *Wheelton* v. *Hardisty*, 26 L. J. Q. B. 265; 8 E. & B. 232; as admitting an alteration of a written instrument, and as being a departure from the declaration, but was supported by Lord Campbell, C.J., on the ground that the prospectus and policy were to be treated as one contract. (And see per Pollock, C. B., *Reis* v. *Scottish Equitable Ass. Co.*, *supra*.)

Principal and surety.]—At law a surety bound by a written instrument cannot avail himself of the rights of a surety unless he appears as such on the face of the instrument; but in equity he is entitled to all the rights of a surety, provided the creditor knew him to be such. (Story, Eq. Jur. 883, 883 *a*.) Accordingly a plea on equitable grounds that the defendant made a promissory note jointly with others as surety for one of them, and that the plaintiff by a valid agreement gave time to the principal debtor, without the consent of the defendant, was held good on demurrer. (*Pooley* v. *Harradine*, 26 L. J. Q. B. 156; 7 E. & B. 431; *Strong* v. *Foster*, 25 L. J. C. P. 106; 17 C. B. 201; *Greenough* v. *M'Lellan*, 30 L. J. Q. B. 15; and see *Lawrence* v. *Walmsley*, 31 L. J. C. P. 143; *ante*, p. 459.) To an action on a bond of guarantee to a limited amount, the defendant may shew by an

destroyed by fire which prevented its completion: Watts v. *Shuttleworth,* 29 L. J. Ex. 229.

Plea on equitable grounds, to an action for the conversion of goods, that the goods were sold to the defendant and paid for by him

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equitable plea that he executed the bond on the faith that the advances were not to exceed the limit of the guarantee, and that greater advances were made. (*Gordon* v. *Rae,* 27 L. J. Q. B. 185; 8 E. & B. 1065.) Where the defendant guaranteed in writing the completion of certain building work for the plaintiff by a third party, and the plaintiff had contracted with the latter to insure the work from fire during its progress, the plaintiff having failed to insure and the work having been destroyed by fire, whereby its completion was prevented, it was held that the defendant was discharged in equity, and had a good ground for an equitable plea. (*Watts* v. *Shuttleworth,* 29 L. J. Ex. 229.)

Cross-demands and set-off.]—The mere existence of cross-demands is not a ground for the interference of courts of equity. (Story, Eq. Jur. § 1436.) Therefore matter which would afford ground for a cross-action is not on that account ground for an equitable plea. (See *ante,* p. 478 (*a*).) A plea on equitable grounds to an action for freight, that the plaintiff in the course of carrying the goods had negligently damaged them to an amount equal to his claim for freight, which damages the defendant claimed equitably to set off against the claim of the plaintiff, was held bad on demurrer. (*Stimson* v. *Hall,* 26 L. J. Ex. 212; 1 H. & N. 831.) And in an action for money lent the court refused leave to plead as an equitable defence that the money was advanced on the security of goods sufficient to reimburse the plaintiff, who wrongfully sold them for an inadequate price. (*Atterbury* v. *Jarvie,* 26 L. J. Ex. 178; 2 H. & N. 114.) But to an action on the covenant in a mortgage-deed an equitable plea stating that the plaintiff had sold the property comprised in the mortgage under a power of sale, and held sufficient out of the proceeds to pay all the money due, was admitted to be a defence. (*Marcan* v. *Bloxam,* 25 L. J. Ex. 193; 11 Ex. 586.) Courts of equity will allow a defendant sued for a debt due to the plaintiff, to set off debts due from the plaintiff to a trustee for the defendant, and such debts may be set off in an action at law in a plea upon equitable grounds. (*Cochrane* v. *Green,* 9 C. B. N. S. 448.)

Equities of third parties.]—It is sufficient if the equitable grounds entitle the defendant to absolute and complete relief against the plaintiff, although against other parties, strangers to the action, equities remain unsettled. Thus to an action brought by a husband to recover money which had been settled to the separate use of his wife, but paid to the defendant by her order, a plea that the money was assigned by the wife to the defendant as a trustee upon trusts under which the plaintiff took no interest was held to constitute a good defence, although the court could not by its judgment enforce the trusts. (*Sloper* v. *Cottrell,* 26 L. J. Q. B. 7.) But an equitable pleading will not be allowed, where it is impossible to do justice without bringing other parties before the court. (*Schlumberger* v. *Lister,* 30 L. J. Q. B. 3.)

Effect of proceeding both at law and in equity.]—If, after a decree in equity a party proceeds at law for the same matter, the court of equity will interfere by way of injunction. (Story, Eq. Jur. § 889.) But it is said that a court of law never interferes with an action merely upon the ground that a suit is pending in equity. (*Pearse* v. *Robins,* 26 L. J. Ex. 183.) By the C. L. P. Act, 1852, s. 226, it is enacted that a court of law shall stay an action when it is restrained by an injunction in Chancery. A plea on equitable grounds to the effect that the causes of action in the declaration

but were omitted by mistake in the bought-and-sold notes: Steele v. *Haddock*, 10 Ex. 643.

Replication on equitable grounds, to a plea of release, that the release though in general terms was not intended to apply to the claim sued for: Lyall v. *Edwards*, 30 L. J. Ex. 193; 6 H. & N. 337.

Replication on equitable grounds, to a plea of an agreement discharging the debt, that the agreement was by mistake worded so as to include the debt, and that the real agreement had been performed: Vorley v. *Barrett*, 26 L. J. C. P. 1; 1 C. B. N. S. 225.

Replication upon equitable grounds, in an action on a policy of insurance, that it was made upon the faith of a prospectus published by the insurers that all policies should be indisputable except for fraud: Wood v. *Dwarris*, 25 L. J. Ex. 129.

Plea on equitable grounds, of a set-off for a judgment recovered against the plaintiff by a trustee for the defendant on promissory notes made by the plaintiff and indorsed to the trustee to hold for the defendant: Cochrane v. *Green*, 9 C. B. N. S. 448.

Plea on equitable grounds, to an action on the covenant in a mortgage-deed, that the plaintiff had sold the mortgaged property under the power of sale, and held sufficient proceeds to pay the debt: Marcon v. *Bloxam*, 25 L. J. Ex. 193; 11 Ex. 586.

Plea on equitable grounds, to an action on a covenant in a mortgage-deed, showing that the equity of redemption had become absolutely vested in the mortgagee, and so the debt was discharged: Gee v. *Smart*, 8 E. & B. 313.

Plea on equitable grounds, to an action on a covenant to keep up a

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had been finally adjudicated upon by a decree in Chancery was held bad on demurrer because the defendant did not show an equity to an unconditional injunction. (*Phelps* v. *Prothero*, 24 L. J. C. P. 225. An injunction upon terms in Chancery was decreed in the same case. 25 L. J. C. 105.) A similar plea of a decree in equity upon the same causes of dispute was not allowed, on the ground that the relief in equity being different from that at law, a decree can never operate as an estoppel by analogy to a judgment at law. (*Collins* v. *Cave*, 27 L. J. Ex. 146.) After an application to the Court of Chancery for an injunction, the defendant will not be allowed to plead the same matter at law as an equitable defence (*Schlumberger* v. *Lister*, 29 L. J. Q. B. 157); and after an equitable defence has been pleaded to an action at law, the Court of Chancery will not entertain any application for an injunction on the same question. (*Terrell* v. *Higgs*, 26 L. J. C. 837; 1 De G. & J. 388; *Wild* v. *Hillas*, 28 L. J. C. 170.) A court of equity will not refuse relief by restraining an action because the defendant at law might plead the matter of defence by way of equitable plea, as it is not compulsory upon him so to plead (*Kingsford* v. *Swinford*, 28 L. J. C. 413; *Gompertz* v. *Pooley*, 28 L. J. C. 484); and where a defendant in an action at law has a set-off upon equitable grounds, he is not obliged to assert it in the action, but may reserve it to be enforced in a court of equity. (*Jenner* v. *Morris*, 30 L. J. C. 361.)

See further as to equitable grounds for relief against judgments, Story, Eq. Jur. § 874–900; *Earl of Oxford's case*, 2 White & Tudor's L. C. 442; 1 Chit. Pr. 11th ed. 252.

policy of insurance as security for a debt, that the defendant became bankrupt and the plaintiff proved in respect of the debt: Elder v. *Beaumont*, 8 E. & B. 353.

Estoppel (*a*).

Plea in Estoppel of a Judgment against the Plaintiff in a former Suit for the same Cause of Action (*b*).

[*Commence with the form, ante, p.* 387.] That before this suit the plaintiff brought an action against the defendant in the Court of —— for the same debt [*or*, cause of action] as in the declaration mentioned; and such proceedings were thereupon had in that action that afterwards and before this suit it was considered by the judg-

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(*a*) *Estoppel.*]—Matter of estoppel by *record* or by *deed* must be pleaded, where there is an opportunity of pleading it. The party omitting to plead it when he may do so, cannot rely upon it as conclusive in evidence. (*Litchfield* v. *Ready*, 5 Ex. 939, 945; *Feversham* v. *Emerson*, 11 Ex. 385; *Wilkinson* v. *Kirby*, 15 C. B. 439; *Young* v. *Raincock*, 7 C. B. 310; *Matthew* v. *Osborne*, 13 C. B. 919; *Doe* v. *Wellsman*, 2 Ex. 368; *Vooght* v. *Winch*, 2 B. & Ald. 662.) Where there is no opportunity of pleading it, it is conclusive in evidence. (*Doe* v. *Huddart*, 2 C. M. & R. 316; *Magrath* v. *Hardy*, 4 Bing. N. C. 782; *Cammell* v. *Sewell*, 27 L. J. Ex. 447; 3 H. & N. 617; 5 H. & N. 728; and see as to estoppel in general, *Duchess of Kingston's case*, 2 Smith's L. C. 5th ed. 642, notes.)

Matter of estoppel *in pais*, as by payment or acceptance of rent, etc., may be relied on in evidence as conclusive without being specially pleaded, though such matter may be pleaded without objection: see *Darlington* v. *Pritchard*, 4 M. & G. 783, where the acceptance of rent was pleaded by way of estoppel to a plea alleging title; and see *Sanderson* v. *Collman*, 4 M. & G. 209, where the acceptance of a bill by the defendant was pleaded by way of estoppel to a plea traversing the drawing. Where the matter of estoppel already appears on the pleadings, the objection may be raised by demurrer. (*Beckett* v. *Bradley*, 2 D. & L. 586; *Sanderson* v. *Collman*, 4 M. & G. 209, 225; *Macgregor* v. *Rhodes*, 6 E. & B. 266; 25 L. J. Q. B. 318.) The estoppel operates only between the same parties and their privies (*Doe* v. *Oliver*, 2 Smith's L. C. 5th ed. 634, notes; *Petrie* v. *Nuttall*, 11 Ex. 569); and where the estoppel is by deed, it is not available in an action not founded on the deed and wholly collateral to it (*Carpenter* v. *Buller*, 8 M. & W. 209; and see *Wiles* v. *Woodward*, 5 Ex. 557, 563; *South-Eastern Ry. Co.* v. *Warton*, 6 H. & N. 520; *Fraser* v. *Pendlebury*, 31 L. J. C. P. 1.)

(*b*) A judgment recovered against the plaintiff in a former suit for the same cause of action is matter of estoppel, and should be pleaded as such. (*Vooght* v. *Winch*, 2 B. & Ald. 662; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; *Overton* v. *Harvey*, 9 C. B. 324.) A judgment recovered against the defendant operates as a merger of the original cause of action, and should be pleaded in bar. (See *post*, "*Judgment Recovered*;" *Smith* v. *Nicolls*, 5 Bing. N. C. 208, 220.) A final and conclusive judgment of a foreign court against the plaintiff may be pleaded in estoppel. (*Plummer* v. *Woodburne*, 4 B. & C. 625; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; and see as to foreign judgments, *ante*, p. 167 (*a*).)

The issues decided in a suit are conclusive between the same parties, and cannot be again litigated between them; and so also, it seems, are all the

ment of the said court in the said action that the plaintiff should take nothing by his writ for or in respect of the said debt [*or*, cause of action]; and the said judgment still remains in force. [*Conclude as ante, p.* 387.]

Like pleas; Palmer v. *Temple*, 9 A. & E. 508; *Overton* v. *Harvey*, 9 C. B. 324; *Gordon* v. *Whitehouse*, 18 C. B. 747.

As to the replication to this plea, see ante, p. 392; *post*, "*Judgment.*"

Plea in estoppel of a judgment against the plaintiff in a foreign court: Plummer v. *Woodburne*, 4 B. & C. 625; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; *Callandar* v. *Dittrich*, 4 M. & G. 68. [*And see as to foreign judgments, ante, p.* 167 (*a*).]

Plea in estoppel, that a set-off, in respect of the debt now sued for, was pleaded by the now plaintiff in a former action between the same parties and adjudged against him: Eastmure v. *Laws*, 5 Bing. N. C. 444.

Plea in estoppel, that by a deed made between the plaintiff and the defendant, the plaintiff acknowledged the settlement of the claim: South-Eastern Ry. Co. v. *Warton*, 6 H. & N. 520.

Replication by way of estoppel to a plea of set-off, of a judgment in a county court upon the same matter.

[*Commence with the form, ante, p.* 393.] Before this suit the now defendant in the county court of ——, holden at ——, then being a court duly constituted and holden under the statutes relating to the county courts, and then having jurisdiction to hear and determine the plaint hereinafter mentioned, levied a plaint against the now plaintiff for the recovery of the same debt, which the now defendant seeks to set off against the now plaintiff's claim to which that plea is pleaded; and such proceedings were thereupon had in the said court in the matter of the said plaint, that afterwards it was considered and adjudged by the said court in the matter of the said plaint, that the now plaintiff did not owe to the now defendant the said debt or any part thereof, and that the now defendant should take nothing by his said plaint in that behalf, and the said judgment still remains in force. [*Conclude as ante, p.* 393.]

Replication in estoppel, to a plea by the acceptor of a bill traversing the drawing, that the bill purported to be so drawn at the time of the acceptance: Sanderson v. *Collman*, 4 M. & G. 209. [*Such*

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material facts alleged by one party and admitted by the other. (*Boileau* v. *Rutlin*, 2 Ex. 665.) So, a judgment against the defendant by default estops him from disputing any traversable allegation in the declaration in another action against him at the suit of the same plaintiff; but he is not estopped from pleading a defence which is not inconsistent with any traversable allegation in the declaration in the former action, though it might have been pleaded as a defence to the former action. (*Howlett* v. *Tarte*, 10 C. B., N. S. 813; 31 L. J. C. P. 146.)

plea however would be bad on demurrer, and the replication in estoppel is unnecessary: Tb. 225; *Macgregor* v. *Rhodes*, 6 E. & B. 266; 25 L. J. Q. B. 318; *ante*, p. 491, n. (*a*).]

Replication in estoppel, to a plea asserting title, that the defendant accepted a lease from the plaintiff: Darlington v. *Pritchard*, 4 M. & G. 783.

Executors and Administrators.

Plea traversing that the Defendant [or the Plaintiff] is Executor or Administrator (a).

That he [*or* the plaintiff] never was nor is he executor [*or* administrator] as alleged.

Plea in abatement of the nonjoinder of a co-executor as plaintiff or defendant: see ante, p. 407.

Plea of Never Indebted by an Executor or Administrator.

That he [*or, if the count claims money payable by the testator in his lifetime,* the said *G. H.*] never was indebted as alleged. [*If the declaration claims money payable by both, say,* that neither he nor the said *G. H.* ever was indebted as alleged.]

Plea of Plene Administravit (b).

That he has fully administered all the personal estate and effects which were of the said *G. H.*, and which have ever come to the

(*a*) By r. 5, T. T. 1853, "In all actions by and against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as an issue, unless specially denied." A plea by one of two defendants sued as executors that the other only was not executor, is a bad plea. (*Atkins* v. *Humphrey*, 2 C. B. 654.) As to these pleas, see 2 Wms. Ex. 5th ed. 1710, 1758.

(*b*) As to this form, see 2 Wms. Ex. 5th ed. 1768. The averment that the defendant had not at the commencement of the suit or ever since any goods of the deceased is essential, and without it the plea would be bad in substance. (Ib.)

If the executor or administrator has no assets of the deceased, he must plead *plene administravit*; otherwise he will be taken to admit that he has assets and may eventually be made personally liable for the debt, damages and costs, if they cannot be levied on the goods of the deceased. (2 Wms. Ex. 5th ed. 1767, 1790.)

Upon *plene administravit* being pleaded, the plaintiff may take judgment for his debt and costs of future assets *quando acciderint* (*Cox* v. *Peacock*, 4 Dowl. 134; Chit. Forms, 9th ed. 697; 2 Wms. Ex. 5th ed. 1797); or the plaintiff may take issue on the plea, and if successful, he may then obtain judgment to the extent of assets proved against the defendant, and of future assets *quando acciderint* for the residue, if any, of his debt. (2 Wms. Ex. 5th ed. 1790.) If he fails to prove any assets under such issue, it is said he cannot take judgment of future assets *quando acciderint*. (Ib. 1794.)

A successful plaintiff in an action against an executor is entitled to judgment for his costs, to be levied of the goods of the deceased, if any, and if

hands of the defendant as executor [*or* administrator] as aforesaid to be administered; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *G. H.* in the hands of the defendant as executor [*or* administrator] as aforesaid to be administered.

Replication and Interlocutory Judgment of future assets quando acciderint, where the Defendant pleads plene administravit, together with other Pleas.

And the plaintiff, as to the —— plea of the defendant, says that

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not, then of the goods of the defendant. (*Marshall* v. *Willder*, 9 B. & C. 655; 2 Wms. Ex. 5th ed. 1792.) And it is said that if the executor or administrator pleads *ne unques executor* or *administrator*, or a release to *himself*, and it is found against him, as these pleas are considered false within his own knowledge, the judgment as to debt, damages and costs, will be *de bonis testatoris si, etc., et si non de bonis propriis.* (2 Wms. Ex. 5th ed. 1789.) An executor or administrator should therefore be careful not to plead any defence without good ground for success, as he may, if unsuccessful, become personally liable for costs. (2 Wms. Ex. 5th ed. 1792.) An executor or administrator succeeding on the plea of *plene administravit* is entitled to the general costs of the cause, although other issues are found against him. (*Edwards* v. *Bethel*, 1 B. & Ald. 254.)

Under an issue taken on the plea of *plene administravit* the burthen of proof lies on the plaintiff, and he may prove assets either before the commencement of the suit, or after the commencement of the suit and before the plea, which were formerly matters of distinct replications. If assets have been received after plea pleaded, the plaintiff must not take issue, but should take judgment of future assets *quando acciderint.* (*Smith* v. *Tatham*, 2 Ex. 205; 2 Wms. Ex. 5th ed. 1796.) The defendant may under this plea prove in answer to the plaintiff's evidence of assets received the payment of the funeral and testamentary expenses, a retainer for his own debt, the payment before suit of debts not inferior in kind to the debt of the plaintiff, or of debts inferior in kind before he had notice of the plaintiff's debt; but he cannot prove debts even of a higher degree which he has not paid. A retainer of assets to meet these debts must be pleaded in one of the more special forms given above. (2 Wms. Ex. 5th ed. 1786.) A retainer by the executor for his own debt is also sometimes expressly pleaded; but such plea is unnecessary. (Ib. 1774.)

If the plaintiff is in doubt, upon *plene administravit* being pleaded, whether to take issue or to take judgment of future assets *quando acciderint*, it will be found convenient to administer interrogatories under the C. L. P. Act, 1854, s. 51, in order to obtain a discovery of the assets and debts of the testator, and of the disposal of the assets by the defendant.

The judgment against the assets of the deceased may be enforced by *fi. fa.* If the sheriff returns *nulla bona testatoris* and also a *devastavit*, which he may do, the plaintiff may then sue out a *fi. fa. de bonis propriis* or a *ca. sa.* against the defendant. If the sheriff returns *nulla bona testatoris* only, the plaintiff may obtain execution *de bonis propriis* by proceeding by *scire fieri* inquiry. The plaintiff may also proceed by action on the judgment suggesting a *devastavit.* (2 Wms. Ex. 5th ed. 1797; and see 2 Chit. Pr. 11th ed. p. 1222; Chit. Forms, 9th ed. 702 (*b*).)

The judgment of assets *quando acciderint* may be enforced by action of debt upon the judgment, or the plaintiff may proceed in the manner provided by the C. L. P. Act, 1852, as to writs of revivor. (See C. L. P. Act, 1854, s. 91; 2 Wms. Ex. 5th ed. 1807.)

[*state the matter replied, or if the replication takes and joins issue it will be:* and the plaintiff takes and joins issue on the —— and —— pleas of the defendant].

And the plaintiff, as to the —— plea of the defendant [*the plea of plene administravit*], admits the same to be true, and prays judgment for his said debt, and the damages by him sustained by reason of the detention thereof [*or in the case of unliquidated damages* for the damages by him sustained by reason of the causes of action in the declaration alleged] to be adjudged to him, to be levied of the personal estate and effects which were of the said *G. H.*, and which shall hereafter come to the hands of the defendant as executor [*or* administrator] as aforesaid to be administered; but because it is uncertain whether the defendant will be convicted upon the issues above joined between the said parties to be tried by the country or not, therefore let the giving of judgment herein be stayed until the trial and determination of the said issues, etc. [*If the defendant has pleaded* plene administravit præter, *the entry must be varied accordingly: see the forms given in Chit. Forms, 9th ed.* p. 701.]

Plea of Plene Administravit Præter (*a*).

That he has fully administered all the personal estate and effects which were of the said *G. H.*, and which have ever come to the hands of the defendant as executor [*or* administrator] as aforesaid to be administered, except personal estate and effects of the value of £——; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *G. H.* in the hands of the defendant as executor [*or* administrator] as aforesaid to be administered, except the said personal estate and effects of the value aforesaid.

Plea of Plene Administravit by the Executor of an Executor.

That the said *G. H.* [*the first executor*] in his lifetime fully administered all the personal estate and effects which were of the said *J. K.* [*the original testator*], and which ever came to the hands of the said *G. H.* as executor as aforesaid to be administered; and the defendant has fully administered all the personal estate and effects which were of the said *J. K.*, and which have ever come to the hands of the defendant as executor as aforesaid to be administered; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *J. K.* in the hands of the defendant as executor as aforesaid to be administered.

(*a*) The plaintiff may take issue on this plea, or may have judgment to the extent of the assets acknowledged, and of future assets *quando acciderint* for the residue of his debt and costs. (Chit. Forms, 9th ed. 699.) The defendant might pay into court the amount of assets admitted, but this would not generally be expedient, as by allowing the plaintiff to take judgment, the defendant might plead the judgment even to a pending action for a debt of equal degree. (See *post*, 497 (*a*).)

Plea of a Retainer by the Defendant as Executor for his own Debt.

An executor or administrator has a right to retain assets in payment of a debt due from the deceased to himself in preference to all other creditors of an equal degree. (2 Wms. Ex. 5th. ed. 936.) Such retainer is sometimes pleaded specially; but this is unnecessary, as the defence may be given in evidence under *plene administravit.* (Ib. 1774; and see note, *ante*, p. 494.)

Plea of Judgment and Specialty Debts outstanding against the Testator, and Plene Administravit Præter (*a*).

That in the lifetime of the said *G. H., J. K.*, on the —— day of ——, A.D. ——, in the court of —— at Westminster, by the judgment of the said court recovered against the said *G. H.* £——, which said judgment is still in force and unsatisfied [*add any other judgment debts in like manner. If there be a bond debt, state it thus:* and the said *G. H.* in his lifetime by his bond became bound to *L. M.* in the sum of £——, to be paid by the said *G. H.* to the said *L. M.*, subject to a condition that if the said *G. H.* should pay to the said *L. M.* £—— with interest thereon, at £—— per cent. per annum, on the —— day of ——, A.D. ——, the said bond should be void, and at the commencement of this suit there was and still is due to the said *L. M.* on the said bond £——; *state any other bond debts in like manner. If there be a debt under a covenant, state it thus:* and the said *G. H.* in his lifetime, by deed bearing date the —— day of ——, A.D. ——, covenanted with *N. O.* to pay to the said *N. O.* £—— on the —— day of ——, A.D. ——, with interest for the same in the meantime at the rate of £—— per cent. per annum, and at the commencement of this suit there was and still is due to the said *N. O.* under the said covenant £——;

(*a*) An executor or administrator must plead specially the existence of debts of a higher nature than that sued for and no assets *ultra;* and all such debts must be stated in the plea. He cannot give them in evidence under the plea of *plene administravit.* (*Ante*, note, p. 494; 2 Wms. Ex. 5th ed. 927, 1787.)

The plaintiff may take issue on the plea or may take judgment of future assets *quando acciderint* after satisfying the debts stated in the plea, and under such judgment will be entitled to charge the defendant in priority of all debts not mentioned in the plea. (Chit. Forms, 9th ed. p. 697.)

Where the plea sets up a judgment recovered against the executor himself, if the action is brought for a specialty debt the plea must show that the judgment was obtained on a specialty, or that it was obtained before the executor had notice of the specialty debt of the plaintiff. (2 Wms. Ex. 5th ed. 1772.)

Where the plea sets up a bond debt, the penalty is the debt where the bond is forfeited; but before the bond is forfeited, the sum in the condition is the debt (2 Wms. Ex. 5th ed. 1773); but it is advisable in all cases to show the condition of the bond in the plea, and to state how much is truly due on the bond. (2 Wms. Ex. 5th ed. 1773 n. (f).)

A debt for rent, whether under a demise by parol or under one by deed, is of equal degree with debts by specialty; therefore in an action of debt for rent an executor cannot plead an outstanding specialty debt. (*Gage* v. *Acton*, 1 Salk. 325; 1 L. Raym. 515; and see *Davis* v. *Gyde*, 2 A. & E. 623.)

add any other specialty debts for which the assets are liable]; and the defendant has fully administered all the personal estate and effects which were of the said *G. H.*, and which have ever come to the hands of the defendant as executor [*or* administrator] as aforesaid to be administered, except goods and chattels, the value of which is not sufficient to satisfy the said judgment and specialty debts; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *G. H.* in the hands of the defendant as executor [*or* administrator] as aforesaid to be administered, except the said goods and chattels, the value of which is not sufficient to satisfy the said judgment and specialty debts, and which are liable to satisfy the same.

Like pleas: Hancocke v. *Prowd*, 1 Wms. Saund. 328; *Jones* v. *Roberts*, 2 C. & M. 219.

A like plea in respect of an indemnity bond: Cox v. *Joseph*, 5 T. R. 307.

Plea of payment of an outstanding bond debt after action brought: Oxenham v. *Clapp*, 2 B. & Ad. 314; *Bryan* v. *Clay*, 1 E. & B. 38.

Plea of judgment recovered against the defendant as executor since the commencement of the action, and plene administravit præter: Roberts v. *Wood*, 3 Dowl. 797.

A like plea puis darrein continuance (*a*): *Prince* v. *Nicholson*, 5 Taunt. 333, 665; *Lyttleton* v. *Cross*, 3 B. & C. 317.

Replication, to a plea of an outstanding judgment debt, that the judgment was satisfied (*Hancocke* v. *Prowd*, 1 Wms. Saund. 328); *that the defendant fraudulently permitted the judgment to remain in force after satisfaction: Jones* v. *Roberts*, 2 C. & M. 219 (*b*).

Plea, to an Action for Rent charging the Defendant as Assignee of the Term, that the Defendant became Assignee only as Executor, and that the Premises yielded no Profit, and Plene Administravit (*c*).

That after the making of the alleged deed and during the term

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(*a*) An executor or administrator may give priority to one creditor over others of equal degree by confessing judgment to him; and he may do this even after action brought by another creditor, and plead it in answer to the action; if after plea pleaded he confesses a judgment, he may plead it *puis darrein continuance*. (2 Wms. Ex. 5th ed. 931; 2 Chit. Pr. 11th ed. p. 1219.) Hence, if the defendant applies for time to plead, the plaintiff should object to it being granted except upon the terms of his not pleading any judgment obtained against him subsequently.

(*b*) The plaintiff may reply any matter defeating the judgment: as that it was satisfied, or that it was obtained by fraud and collusion between the executor and the creditor, or that it is kept on foot by fraud. (2 Wms. Ex. 5th ed. 1775.) An executor may confess judgment for a debt barred by the Statute of Limitations, and the statute cannot be relied on by other creditors of the estate to defeat the judgment. (*Hunter* v. *Baxter*, 31 L. J. C. 432.)

(*c*) It has been stated (*ante*, "*Landlord and Tenant*," p. 183 (*a*)) that

thereby granted the said *G. H.* died possessed of the said demised premises, having first duly made his last will and thereby appointed the defendant executor thereof; and the defendant afterwards as such executor duly proved the said will, and entered into the said demised premises and became possessed thereof for the residue of the said term as such executor as aforesaid, and the estate of the said *G. H.* therein did not at any time vest in the defendant by assignment otherwise than as such executor as aforesaid; and the defendant has not at any time since the death of the said *G. H.* received or derived, nor could he during any part of that time receive or derive any profit from the said demised premises, and the said demised premises have not since the death of the said *G. H.* yielded any profit whatever; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *G. H.* in the hands of the defendant as executor as aforesaid to be administered.

Like pleas: Rubery v. *Stevens*, 4 B. & Ad. 241; *Nation* v. *Tozer*, 1 C. M. & R. 172; *Tremeere* v. *Morison*, 1 Bing. N. C. 89; *Hopwood* v. *Whaley*, 6 C. B. 744.

Plea, to a like Action, that the Defendant became Assignee only as Administrator, that the Premises yielded only £——, and Plene Administravit Præter.

That after the making of the alleged deed and during the term thereby granted the said *G. H.* died intestate, possessed of the said demised premises, and after the death of the said *G. H.* letters of administration of the personal estate and effects which were of the said *G. H.* were duly granted to the defendant [by her Majesty's Court of Probate], and the defendant afterwards entered into the said demised premises and became and was possessed thereof for the residue of the said term as such administrator as aforesaid, and the estate of the said *G. H.* therein did not at any time vest in the defendant by assignment otherwise than as such administrator

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the executor of a deceased tenant may be charged at the suit of the landlord either as executor of the deceased or as assignee of the term for the rent accrued due since the decease of the tenant. As assignee of the term he is *primâ facie* liable for such rent *de bonis propriis*; but as executor his liability, in the absence of other assets, is restricted to the extent of the profits derived from the premises. Therefore, when sued as assignee he may plead his representative character, and that the premises yielded no profits, or no profits except a sum admitted, and that he has no other assets, as in the above or following form. (See *Wollaston* v. *Hakewill*, 3 M. & G. 297, 321; and see *ante*, p. 183 (*a*).) The value of the premises under such plea is what the executor by reasonable diligence might have derived from them. (*Hornidge* v. *Wilson*, 11 A. & E. 655; *Hopwood* v. *Whaley*, 6 C. B. 744.)

If the value of the land is of less value than the rent, and there are no assets to satisfy the rent, the executor may waive and abandon the lease altogether by giving a proper notice of his intention to the landlord. (2 Wms. Ex. 5th ed. 1591.) And such waiver will be an answer to any subsequent rent. (*Nation* v. *Tozer*, 1 C. M. & R. 173; see a plea to that effect, *Hornidge* v. *Wilson*, 11 A. & E. 645.)

An executor may also protect himself from claims under the lease by availing himself of the provisions of 22 & 23 Vict. c. 35, s. 27. (See *ante*, p. 184.)

as aforesaid; and the defendant has not since the death of the said *G. H.* received or derived, nor could he during any part of that time receive or derive any profit from the said demised premises except to the amount of £——; and the said premises have not since the death of the said *G. H.* yielded any profit whatever except the said £——; and the defendant had not at the commencement of this suit, nor has he since had, nor has he any personal estate or effects which were of the said *G. H.* in the hands of the defendant as administrator as aforesaid to be administered, except the said rents and profits to the amount of £——. [*If the profits admitted are paid into court, add* and the defendant brings here into court the said £—— ready to be paid to the plaintiff.]

A like plea: Hornidge v. *Wilson*, 11 A. & E. 645.

EXONERATION. See *post*, "*Rescission of Contract*," p. 568.

FELONY. See "*Attainder*," *ante*, p. 430.

FORBEARANCE.

General Issue (*a*).

"Non Assumpsit," *ante*, p. 401.

Plea denying the original Debt or Cause of Action forborne (*where no Action was pending*).

That he never was indebted [*or* that the plaintiff had not a good cause of action against the defendant, *traversing the allegation in the declaration in terms*] as alleged.

Plea denying the Debt or Cause of Action (*where a pending Action was forborne*).

That the plaintiff had not at any time any cause of action in respect of the subject-matter of the action brought by the plaintiff against the defendant as alleged, as the plaintiff at the time of the alleged promise well knew.

A like plea: Wade v. *Simeon*, 2 C. B. 548.

(*a*) The promise to forbear and stay proceedings is denied by the general issue *non assumpsit*. If the debt or cause of action agreed to be forborne is stated in the declaration as a distinct averment, it must, if intended to be denied, be traversed in terms (see *ante*, p. 134 n. (*a*)). The forbearance itself and the alleged breach, if denied, must also be specifically traversed.

Plea denying the Forbearance.

That the plaintiff has not stayed all further proceedings in the said action as alleged [*traversing the allegation in the terms of the declaration*].

Fraud (*a*).

Plea that the Contract was induced by the Fraud of the Plaintiff.

That he was induced to make the alleged promise [*or* agreement, *or* to accept the said bill, *or* to execute the alleged deed, *or, to an indebitatus count,* to contract the alleged debt] by the fraud of the plaintiff.

Like pleas of fraud to actions on bills of exchange or promissory notes: Stone v. *Compton,* 5 Bing. N. C. 142; *Green* v. *Gosden,* 3 M. & G. 446; *Robson* v. *Luscombe,* 2 D. & L. 859; *Daniels* v. *Coombe,* 2 M. & G. 347. *On a bond: Raphael* v. *Goodman,* 8 A. & E. 565; *Spencer* v. *Handley,* 4 M. & G. 414. *On a policy of insurance: Redman* v. *Wilson,* 14 M. & W. 476.

Plea, to an action on a deed of separation between the defendant

(*a*) A contract procured by fraud is voidable at the election of the party so induced to enter into it; but until he has disaffirmed the contract it remains valid. (*Selway* v. *Fogg,* 5 M. & W. 83; *Murray* v. *Mann,* 2 Ex. 538; *Pilbrow* v. *Pilbrow's Atmospheric Ry. Co.,* 5 C. B. 453; *Deposit Life Ass. Co.* v. *Ayscough,* 26 L. J. Q. B. 29; 6 E. & B. 761.) This defence must be specially pleaded (r. 8, T. T. 1853); but it may be pleaded in most cases in the general form above given (*Robson* v. *Luscombe,* 2 D. & L. 859), which is applicable also to the indebitatus count for goods sold and delivered. (*Lawton* v. *Elmore,* 27 L. J. Ex. 141.) Where it is pleaded with particularity, no other fraud can be proved than that averred. (*Tuck* v. *Tooke,* 9 B. & C. 437.) A defendant will not be allowed to plead several pleas founded on the same fraud, but varying the statement of the circumstances. (*Reid* v. *Rew,* 2 Dowl. N. S. 543.) As to what amounts to fraud, see *ante,* p. 289 (*b*). A contract is voidable for the fraud of an agent through whom it was made, though the principal did not authorize the fraud, and is not responsible for it. (*Udell* v. *Atherton,* 30 L. J. Ex. 337.)

In actions on special contracts under which the defendant may have received a benefit, it may be necessary for him to plead further that he has repudiated the contract. (Per Crompton, J., *Deposit Life Ass. Co.* v. *Ayscough,* 26 L. J. Q. B. 29.)

A plea, to a count by a public company against a shareholder, that the defendant was induced to become a shareholder by the fraud of the plaintiffs was held bad, as admitting that the defendant was still a *de facto* shareholder. (*Deposit Life Ass. Co.* v. *Ayscough,* 26 L. J. Q. B. 29; 6 E. & B. 761; and see *Clarke* v. *Dickson,* 27 L. J. Q. B. 223.) In such case the defendant should further plead that upon discovery of the fraud he had renounced the shares and ceased to be a shareholder. (*Ib.*; and see *post,* "*Infancy,*" p. 516 (*a*).) A shareholder, induced to become so by the fraud of the company, cannot repudiate his liability as against creditors of the company not parties to the fraud. (*Henderson* v. *Royal British Bank,* 7 E. & B. 356; 26 L. J. Q. B. 112; *Powis* v. *Harding,* 26 L. J. C. P. 107.)

and his wife, that the deed was obtained by the fraudulent misrepresentation of the plaintiff, being the trustee, that the wife was chaste: Evans v. *Edmonds*, 22 L. J. C. P. 211; 13 C. B. 777.

Plea that the Defendant was induced to contract by Fraud, and afterwards repudiated the Contract.

That he was induced to make the alleged contract [*or* agreement] by the fraud of the plaintiff, and within a reasonable time after he had notice of the said fraud and before he had received any benefit under the said contract [*or* agreement] he repudiated and abandoned the same, and gave notice of his repudiation and abandonment thereof to the plaintiff.

Plea, to an Action by a Public Company for Calls, that the Defendant was induced to become a Shareholder by Fraud, and repudiated the Shares.

That he was induced to become the holder of the said shares by the fraud of the plaintiffs, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of the said shares or any of them, he repudiated and disclaimed the said shares, and all title thereto, and all liability in respect thereof, and gave notice of his repudiation and disclaimer thereof to the plaintiffs.

Replication of Fraud and Repudiation to a Plea of a Bill of Exchange given for and on account or in discharge of a Debt.

That he was induced to receive the said bill as alleged by the fraud of the defendant, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from the said bill, the plaintiff repudiated the said bill and the receipt thereof by him, and refused to have or retain the same for and on account [*or* in satisfaction and discharge] of the said debt and the cause of action in respect thereof, and then gave notice thereof to the defendant, and delivered back [*or* tendered and offered to deliver back] the same to the defendant.

Friendly Societies (*a*).

Plea that the rules of the society were not duly certified and en-

(*a*) The Act for consolidating and amending the Law relating to Friendly Societies, 18 & 19 Vict. c. 63 (amended by 21 & 22 Vict. c. 101, s. 40), s. 40, enacts that disputes between the members or persons claiming through or under a member, and the trustee or officers, shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal. And see the previous statutes, 10 Geo. IV. c. 56, s. 27; 13 & 14 Vict. c. 115, ss. 22, 23. By s. 41, applications for the settlement of disputes in any society, the rules of which do not prescribe any other mode of settling such disputes, or to enforce an

rolled according to the statute (under 10 *Geo. IV. c.* 56, *s.* 4) (*a*): *Bradburne* v. *Whitbread,* 5 M. & G. 439; *Margett* v. *Parkes,* 1 D. & L. 582.

Plea, to an action on a note, that it was given as security for a loan made by the trustees of a loan society of a greater amount than £15, *contrary to* 5 *&* 6 *Will. IV. c.* 23, *s.* 6; *and see* 3 *&* 4 *Vict. c.* 110, *s.* 13 *Bawden* v. *Howell,* 3 M. & G. 638.

Plea, to an action on a note against a surety for a loan from a loan society, that by a contemporaneous agreement incorporating the rules of the society, no legal proceedings were to be taken against the surety until notice of the default of the principal, which had not been given: Brown v. *Langley,* 4 M. & G. 466; *and see Brown* v. *Wilkinson,* 13 M. & W. 14.

Plea under 10 *Geo. IV. c.* 56, *s.* 27, *that by the rules of the society all disputes between the society and its members should be determined by the committee of the society for the time being: Cutbill* v. *Kingdom,* 1 Ex. 494.

Plea, under the same enactment, that by the rules of the society disputes should be referred to arbitration in manner provided by the rules: Morrison v. *Glover,* 4 Ex. 430; *Reeves* v. *White,* 17 Q. B. 445; *Farmer* v. *Giles,* 5 H. & N. 753; 30 L. J. Ex. 65.

Plea that by the rules of the society matters in dispute between the society and its members should be decided by justices of the peace: Sinden v. *Bankes,* 30 L. J. Q. B. 102.

Plea setting out the rules of a benefit building society established under 6 *&* 7 *Will. IV. c.* 32: *Card* v. *Carr,* 26 L. J. C. P. 113; 1 C. B. N. S. 197.

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award, or upon failure of an arbitration respecting such disputes, are to be made to the county-court of the district within which the usual or principal place of business of the society shall be situate; and the decision of such county court upon such application is not subject to any appeal. It would seem that the mode of decision provided by the rules ousts the jurisdiction of the superior courts (*Crisp* v. *Bunbury,* 8 Bing. 394; *Albon* v. *Pyke,* 4 M. & G. 421); but it is confined, according to the words of the statute, to disputes arising between the society and the members, as members; disputes relating to matters in which the members are concerned, but not as members, remain within the jurisdiction of the courts. (*Cutbill* v. *Kingdom,* 1 Ex. 494; *Morrison* v. *Glover,* 4 Ex. 430.) Thus, where the society has lent money to members on the security of mortgages, or where members have entered into express covenants with the society, disputes relating to such mortgages or covenants are not within the statute. (Ib.; *Farmer* v. *Giles,* 30 L. J. Ex. 65.)

(*a*) And see 18 & 19 Vict. *c.* 63, s. 26, requiring the rules to be certified.

Where the plaintiff relies upon the privileges given by the statutes to support his action, this is a good plea. It is otherwise where he can sustain his action without the aid of the statutes, as upon a bond given to the plaintiff, although it was executed to him as treasurer of a friendly society (*Jones* v. *Woollam,* 5 B. & Ald. 769); or upon a note made payable to the plaintiff. (*Bawden* v. *Howell,* 3 M. & G. 638.)

GAMING (*a*).

Plea that a Check was drawn for Money lost upon a Wager.
(*8 & 9 Vict. c.* 109, *s.* 18.)

That he made and delivered the said check to the plaintiff for money won by the plaintiff from him upon a contract made between

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(*a*) At the common law a *wager*, or promise made upon a chance event in which neither party had any interest except that created by the wager, was binding. (*Good* v. *Elliott*, 3 T. R. 693; *Cousins* v. *Nantes*, 3 Taunt. 513, 515; *Hussey* v. *Crickitt*, 3 Camp. 168; *Dalby* v. *India Ass. Co.*, 15 C. B. 365.)

By the statute 9 Anne, c. 14, it was enacted (amongst other things) that all notes and bills given for money won by gaming at cards or other games, or by betting at such games, or for any money knowingly lent for such gaming or betting, should be void.

By the statute 5 & 6 Will. IV. c. 41, s. 1, it is enacted that all such notes and bills, instead of being absolutely void, shall be deemed to have been made for an illegal consideration.

By the statute 8 & 9 Vict. c. 109, s. 15, so much of the statute of Anne as was not altered by the statute of Will. IV. is repealed. And s. 18 enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution for any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise." (As to which proviso, see *Batty* v. *Marriott*, 5 C. B. 832; *Brown* v. *Overbury*, 11 Ex. 715; 25 L. J. Ex. 169; *Parsons* v. *Alexander*, 5 E. & B. 263.)

The effect of these enactments on bills and notes is, that when given for gaming debts within the description of the statute of Anne, they are deemed to be made for illegal considerations; while bills and notes given under gaming or wagering contracts within the statute of Victoria only, being given under contracts which are void, are in the same condition as if given without consideration. (*Fitch* v. *Jones*, 5 E. & B. 238.) In the former case a holder for value with notice of the circumstances under which the bill was given cannot recover on it. (*Hay* v. *Ayling*, 16 Q. B. 423, 431; and see Byles on Bills, 8th ed. p. 128.)

Contracts of wagering made under the form and pretext of insurance by parties having no interest in the subject-matter of such insurance are specially provided against by 14 Geo. III. c. 48. (See *ante*, p. 161.) Marine insurances made, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering," are prohibited by 19 Geo. II. c. 37, s. 1. (*Ante*, p. 155.)

Wagers on the price of stock, in the form of contracts for the sale and delivery of stock, were void under 7 Geo. II. c. 8, commonly called Sir John Barnard's Act, passed "to prevent the infamous practice of stockjobbing" (see *post*, "*Stockjobbing*"); but this statute has been recently repealed by 23 Vict. c. 28.

It is no defence to an action for money paid at the defendant's request that it was paid on account of a wagering contract lost by the defendant, such contract being null and void, but not illegal. (*Jessopp* v. *Lutwyche*, 10 Ex. 614; *Knight* v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566.) But it is otherwise where it is paid in execution of an illegal contract, as money knowingly paid for the defendant on account of a stockjobbing con-

them by way of wagering, that is to say [*state the wager*]; and except as aforesaid there never was any value or consideration for the making or payment of the said check by the defendant.

Plea that a note was made for money won by a bet on the amount of hop duty, and indorsed to the plaintiff without value: Fitch v. *Jones*, 5 E. & B. 238.

Plea that a Bill was accepted by the Defendant for Money won by the Plaintiff from the Defendant by Gaming. (9 *Anne*, *c.* 14; 5 *& 6 Will. IV. c.* 41.)

That he accepted the said bill for money won by the plaintiff from him by gaming [*or* betting on gaming] at cards [*or other game, according to the facts*].

Plea, to an action by the drawer of a bill, that it was accepted by the defendant at the request of a third party for money won by him from the defendant by gaming: Hay v. *Ayling*, 16 Q. B. 423.

Plea that a bill was accepted for money lost at cards, and indorsed to the plaintiff with notice: Fisher v. *Ronalds*, 12 C. B. 762.

Plea that a check was given for money won by gaming: Parsons v. *Alexander*, 5 E. & B. 263.

Plea that a check was given for money lent for gaming, and transferred to the plaintiff without value: Bingham v. *Stanley*, 2 Q. B. 117.

Pleas to an action for money lent that it was lent for the purpose of gaming at an illegal game: M'Kinnell v. *Robinson*, 3 M. & W. 434; *Foot* v. *Baker*, 5 M. & G. 335.

Plea, to an action on a covenant in a mortgage deed, that the mortgage was given partly for money won by gaming: Hill v. *Fox*, 4 H. & N. 359.

Plea, to a count for money received, that it was deposited with the defendant to abide the event of an illegal game; replication that the plaintiff repudiated the wager, and that the event never was determined: Martin v. *Hewson*, 10 Ex. 737.

Plea, to a count for goods bargained and sold, that by the contract of sale the price was to depend upon the event of a wager: Rourke v. *Short*, 25 L. J. Q. B. 196; 5 E. & B. 904.

Pleas that money was deposited with the defendant by divers per-

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tract when prohibited by the 7 Geo. II. c. 8. (*Ib.*; *Mortimer* v. *Gell*, 4 C. B. 543; and see per Parke, B., *Pidgeon* v. *Burslem*, 3 Ex. 465, 471.) Money lent for the purpose of playing at an illegal game cannot be recovered (*M'Kinnell* v. *Robinson*, 3 M. & W. 434); but money lent for the purpose of paying losses by gaming to persons other than the plaintiff, may be recovered. (*Hill* v. *Fox*, 4 H. & N. 359.)

Before the C. L. P. Act, 1852, it was held that the defence of gaming must be pleaded with sufficient particularity to show in what the illegality consisted (*Grizewood* v. *Blane*, 11 C. B. 538; and see *Knight* v. *Fitch*, 15 C. B. 570); and this should still be done.

sons as subscriptions to a lottery upon the event of a horse-race (*a*): *Allport* v. *Nutt*, 1 C. B. 974; *Homes* v. *Lock*, 1 C. B. 524; *Martin* v. *Smith*, 6 Dowl. 639; *Mearing* v. *Hellings*, 14 M. & W. 711; *Gatty* v. *Field*, 9 Q. B. 431.

Pleas that contracts were wagering contracts respecting the price of shares at future days, contrary to 8 *&* 9 *Vict. c.* 109 (*b*): *Lyne* v. *Siesfield*, 1 H. & N. 278; *Jessopp* v. *Lutwyche*, 10 Ex. 614; *Knight* v. *Cambers*, 15 C. B. 562; *Knight* v. *Fitch*, 15 C. B. 566; *Ashton* v. *Dakin*, 7 W. R. 384, Ex.

Pleas that contracts relating to public stock were void under 7 Geo. II. c. 8: *Ib.*; *see post*, "*Stockjobbing*," p. 583.

GARNISHEE. See "*Attachment of Debt*," *ante*, p. 428.

GENERAL ISSUE. See *ante*, p. 396.

GOODS. See "*Sale of Goods*," *post*, p. 570.

GUARANTEES.

General Issue (*c*).

"Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

(*a*) *Lotteries* are prohibited by 10 & 11 Will. III. c. 17, and 42 Geo. III. c. 119; and see as to money deposited to abide the event of any bet or of any game, 16 & 17 Vict. c. 119, s. 107.

(*b*) Such pleas must be sufficiently circumstantial to show that the contracts were necessarily within the statute. (*Knight* v. *Cambers*, 15 C. B. 562, 570.) Where an actual purchase of the shares is made, though the object is to speculate by selling again before the settling day, it is not a gaming contract within the statute. (*Ashton* v. *Dakin*, 7 W. R. Ex. 384.)

(*c*) When the guarantee is made by simple contract, the general issue *non assumpsit* denies the contract, including the promise and the consideration; and under this issue the plaintiff must prove a contract in a form sufficient to satisfy the Statute of Frauds, 29 Car. II. c. 3, s. 4, as modified by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 3, *ante*, p. 138. (*Raikes* v. *Todd*, 8 A. & E. 846; *Lyall* v. *Higgins*, 4 Q. B. 528; *Glover* v. *Hackett*, 26 L. J. Ex. 416; 2 H. & N. 487.) When the contract is under seal, as a covenant or a bond of guarantee, it is denied by the general issue *non est factum*.

All conditions precedent, as that the goods were supplied on credit according to the guarantee, or that the principal made default, or that the plaintiff had notice of it, when necessary (see *Lilley* v. *Hewitt*, 11 Price, 494); and the breach alleged, if denied, must be specifically traversed.

Plea that the Plaintiff did not supply the Goods according to the Guarantee.

That the plaintiff did not sell and deliver goods to the said *G. H.* on credit [*or* on the usual terms of dealing between them, *according to the allegation in the declaration*] as alleged.

Plea that the Principal was not indebted.

That the said *G. H.* was not indebted to the plaintiff as alleged.

Plea of Payment by the Principal.

That before action the said *G. H.* satisfied and discharged the plaintiff's claim by payment.

Plea of satisfaction and discharge by bills given by the principal: Mayer v. *Isaac*, 6 M. & W. 605.

Plea of accord and satisfaction by the principal setting off a debt due to him from the plaintiff: Lyall v. *Higgins*, 4 Q. B. 528.

Pleas to Actions on Bonds of Guarantee of the Performance of all Matters by the Party guaranteed.

On a bond of guarantee given for the engineer of a company: Evans v. *Earle*, 2 Ex. 1; *for a banker's clerk: Anderson* v. *Thornton*, 3 Q. B. 271; *Jephson* v. *Howkins*, 2 M. & G. 366; *for an official assignee in bankruptcy: Lawes* v. *Shaw*, 5 Q. B. 322; *for a partner in a firm: Chapman* v. *Beckington*, 3 Q. B. 703; *for a sheriff's bailiff: Humphrey* v. *Mitchell*, 2 Bing. N. C. 620; *for a clerk to a company: Kitson* v. *Julian*, 4 E. & B. 854.

Replications assigning breaches. (*See the above cases.*)

Plea stating matters in excuse of performance by the party guaranteed: Webb v. *James*, 7 M. & W. 279.

Pleas of release of the principal debtor by the plaintiff: Bain v. *Cooper*, 8 M. & W. 751; *Kearsley* v. *Cole*, 16 M. & W. 128; *Price* v. *Barker*, 4 E. & B. 760.

Plea of a release of the debt contained in a composition deed made between the principal debtor and the plaintiff and his other creditors: Cowper v. *Smith*, 4 M. & W. 519.

Plea of a composition for the debt received from the principal debtor in accord and satisfaction: Davidson v. *McGregor*, 8 M. & W. 755.

Plea that the liabilities of the principal were changed by statute during the pendency of the guarantee, and the defendant thereby discharged; in the case of the treasurer of a borough: Oswald v. *Mayor of Berwick*, 25 L. J. Q. B. 383; *in the case of the bailiff of a county court: Pybus* v. *Gibb*, 26 L. J. Q. B. 41; 6 E. & B. 902. [*And see as to the effect of an alteration in the salary of the principal: North-Western Ry. Co.* v. *Whinray*, 10 Ex. 77.]

Plea that the employment of the principal was not according to the bond of guarantee: Portsea Union v. *Whitlier*, 29 L. J. Q. B. 150.

Plea upon equitable grounds, to an action on a bond of guarantee limited to a certain amount, that the defendant executed the bond on the faith that no advances should be made beyond the limit of the guarantee, and that such advances were made: Gordon v. *Rae*, 27 L. J. Q. B. 185; 8 E. & B. 1065.

See other pleas on equitable grounds to actions against sureties: ante, "Equitable Pleas," p. 485.

That the Plaintiff gave time to the principal Debtor, and thereby discharged the Defendant (*a*).

That whilst the said *G. H.* was indebted to the plaintiff as alleged, it was agreed by and between the plaintiff and the said *G. H.*, with-

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(*a*) If the creditor gives further time to the principal debtor under a binding contract with him to that effect, without the consent of the surety, the latter is thereby discharged; for the surety is deprived by such contract of his right upon payment of the debt to have the securities and remedies of the creditor, and to enforce them in his name. (*Coombe* v. *Woolf*, 8 Bing. 156; *Howell* v. *Jones*, 1 C. M. & R. 97; *Rees* v. *Berrington*, 2 White & Tudor, L. C. 2nd ed. 814; *Fraser* v. *Jordan*, 8 E. & B. 303; 26 L. J. Q. B. 288; and see *ante*, "*Bills of Exchange*," p. 459.) The rule was thus stated by the court in *Moss* v. *Hall*, 5 Ex. 46, 50; *Fraser* v. *Jordan*, 8 E. & B. 303, 308:—"Whenever a party's hands are effectually tied up, so that he cannot break such engagement without being liable for a breach of it, the surety is discharged; the rule being that there must be either a new security given to extend the time, or a binding agreement, upon a sufficient consideration, to suspend the remedy." A contract with a stranger to give time to the principal debtor does not affect the right against the surety. (*Fraser* v. *Jordan*, 8 E. & B. 303.)

A parol agreement to give time to the principal debtor will afford no defence at law to the surety, where he is bound to the creditor by bond or by an instrument under seal (*Davey* v. *Prendergrass*, 5 B. & Ald. 187; *Coombe* v. *Woolf*, 8 Bing. 156, 161); but a court of equity might in some cases restrain the action (*Rees* v. *Berrington*, 2 White & Tudor, L. C. 2nd ed. 814); and such an agreement might in such cases be pleaded as a defence upon equitable grounds. Where the defendant appears upon the face of an instrument as principal, as where he has entered into a bond jointly with the principal debtor, or has made a promissory note jointly with him, he cannot plead at law that he is a surety only, so as to avail himself of the above defence. But it is competent for him in equity to assert this; and he may now also set up this defence in an action at law, as a defence upon equitable grounds. (*Pooley* v. *Harradine*, 7 E. & B. 431; 26 L. J. Q. B. 156; *Greenough* v. *M'Lelland*, 30 L. J. Q. B. 15; and see *ante*, "*Bills of Exchange*," p. 459, "*Equitable Pleas*," p. 485.)

Where the person guaranteed does any act injurious to the surety or inconsistent with the right of the latter, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged in equity (Story's Eq. Jur. s. 325; *Watts* v. *Shuttleworth*, 29 L. J. Ex. 229, 234); thus, where the defendant guaranteed the complete performance of certain building work for the plaintiff by the principal, and by the contract between the plaintiff with the latter the plaintiff agreed to insure the work from fire during its progress, which he

out the consent or knowledge of the defendant, for a good and valuable consideration to the plaintiff in that behalf, that the plaintiff should give time to the said *G. H.*, and forbear to sue him for the alleged debt during a certain time then agreed on between them, being a longer time than the period of credit which the plaintiff ought to have given the said *G. H.* for the payment of the said debt according to the meaning of the said guarantee; and in pursuance of the said agreement, and without the consent or knowledge of the defendant, the plaintiff then gave time to the said *G. H.* and forbore to sue him for the alleged debt during the time so agreed upon as aforesaid.

Like pleas to actions on bills of exchange and promissory notes, ante, p. 459.

Replication to the Plea of Time given to the Debtor, that the Remedies against the Surety were reserved (a).

That by the alleged agreement between the plaintiff and the said *G. H.* it was also further agreed by and between them as part thereof, that neither the said agreement nor the performance thereof should discharge or affect the liability of the defendant upon his said guarantee, and that all the defendant's liabilities and all the plaintiff's rights upon the said guarantee should be, and the same then were reserved and continued as fully as if the alleged agreement had never been entered into or performed.

A like replication: Price v. *Barker*, 4 E. & B. 760.

Replication to a plea of a composition for the debt received from the debtor in accord and satisfaction, that it was agreed with the de-

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failed to do, and the work was burned, and the completion of it thereby prevented, the defendant was held discharged (*Watts* v. *Shuttleworth, supra*); and where the defendant executed a bond of guarantee for advances to be made to a third party, upon the faith that no advances were to be made beyond the limit of the guarantee, he was held discharged by advances being made to a greater amount. (*Gordon* v. *Rae*, 27 L. J. Q. B. 185; 8 E. & B. 1065.)

The relationship of creditor and surety does not, like the contract of insurance, require a full disclosure by the former to the latter of all material facts relating to the principal debtor; and the mere non-communication of such facts, without actual fraud, does not invalidate the guarantee. (*Hamilton* v. *Watson*, 12 Cl. & F. 109; *North British Insurance Co.* v. *Lloyd*, 10 Ex. 523.)

As to the right of the surety to have an assignment of securities from the creditor, see the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5; *ante*, p. 144.

(*a*) An agreement to give time to, or a covenant not to sue, or a release of, the debtor, qualified by a reservation of remedies against the surety, preserves all the rights of the creditor against the surety, as also all the rights of the surety against the debtor. (*Thompson* v. *Lack*, 3 C. B. 540; *Kearsley* v. *Cole*, 16 M. & W. 128; *Price* v. *Barker*, 24 L. J. Q. B. 130; 4 E. & B. 760; *Willis* v. *De Castro*, 27 L. J. C. P. 243; 4 C. B. N. S. 216; and see the notes to *Rees* v. *Berrington*, 2 White & Tudor's L. C. 2nd ed. 814.)

Upon a release of the debt the rights against the surety cannot be reserved; but a deed which in terms is a release may sometimes be construed as a covenant not to sue, in order to carry out the intention of the parties. (*Price* v. *Barker, supra.*)

fendant that it should not discharge him from his liability on the guarantee: Davidson v. *M'Gregor*, 8 M. & W. 755.

Heirs and Devisees (*a*).

Plea by an Heir of Riens per Descent. (1 *Will. IV. c.* 47, *s.* 7.)

That he had not at the commencement of this suit, nor has he since had, nor has he any lands, tenements, or hereditaments by descent from the said *G. H.* in fee simple.

Plea by a Devisee of Riens per Devise.

That he had not at the commencement of this suit, nor has he since had, nor has he any lands, tenements, or hereditaments by devise from the said *G. H.*

Plea by an heir that he has paid other bond creditors before action to the value of the lands descended: Buckley v. *Nightingale*, 1 Strange, 665.

Replication, to a Plea of Riens per Descent, that the Defendant had Lands, etc., from his Ancestor. (1 *Will. IV. c.* 47, *s.* 7.)

That the defendant before action had lands, tenements, and hereditaments in fee simple by descent from the said *G. H.*

A like replication: Brown v. *Shuker*, 1 C. & J. 583.

(*a*) In the action against heir and devisee upon the covenant or bond of the ancestor and testator (*ante*, p. 145), the defendants may plead that the bond or covenant declared on was not the deed of the ancestor as alleged, or may plead payment, or any other matter in confession and avoidance.

They may also plead *riens per descent*, or *riens per devise*. By 1 Will. IV. c. 47, s. 7 (re-enacting substantially 3 W. & M. c. 14, ss. 5, 6), it is provided, that where any action upon any specialty is brought against the heir he may plead *riens per descent* at the time of the original writ brought against him; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought; and if upon issue joined thereupon it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment shall be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended. And by s. 8, it is enacted that the devisee or devisees made liable by this act shall be liable and chargeable in the same manner as the heir at law by force of this act.

The plaintiff may take issue upon the above pleas, and to the plea of *riens per descent* may reply under the statute.

At common law, under the plea of *riens per descent*, the heir who had

Husband and Wife.

Pleas in abatement of the coverture of the plaintiff and of the defendant: see ante, "Abatement," p. 408.

Plea that the Defendant was a Married Woman at the time of making the Contract (a).

[*If the defendant is still married at the time of pleading she must plead in person, ante,* p. 386 (*b*),] that at the time of the making of

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taken lands by descent, but had *bonâ fide* aliened them before action, obtained a verdict; but under the replication given by the statute, the plaintiff, in such case, would be entitled to a verdict, and to execution against the defendant for the value of the lands assessed by the jury. (2 Wms. Saund. 8 (n.); *Brown* v. *Shuker*, 1 C. & J. 583.) By the common law, if issue was joined on the plea of *riens per descent* and the jury found some assets, however small, the plaintiff was entitled to a verdict and a general judgment against the defendant for the debt and costs; in order to avoid this, where there were some assets the defendant was obliged to plead *riens per descent* except the assets confessed. (2 Wms. Saund. 7 *b* (n.).) But it seems doubtful whether the statute does not apply in all cases, and whether the jury are not bound to assess the value of the assets. (*Brown* v. *Shuker*, *supra*.) The heir may plead payment of other specialty creditors before action in reduction of the assets. (2 Wms. Saund. 7 *b* (n.).) The plea of *riens per descent* disputes that the defendant is heir as stated in the declaration. (2 Wms. Saund. 7 *e* (n.).)

(*a*) When a married woman is sued alone upon a contract made by her before marriage she can plead her coverture in abatement only; when she is sued alone upon a contract made during coverture she may plead her coverture in abatement or in bar. If a married woman sues alone in an action in which she might join with her husband, her coverture can only be pleaded in abatement; if the action is one in which she could not join with her husband, her coverture may be pleaded either in abatement or in bar. (*Ante*, "*Husband and Wife*," p. 146 (*b*); "*Abatement*," p. 408 (*a*).) The defence of coverture must be specially pleaded (r. 8, T. T. 1853; *Moss* v. *Smith*, 1 M. & G. 232); when pleaded in bar it is an issuable plea. (*Burch* v. *Leake*, 7 M. & G. 377.) A married woman cannot appoint an attorney, and therefore must plead in person. (See *ante*, p. 5.)

A woman whose husband is *civiliter mortuus*, as while he is under sentence of transportation (*Carrol* v. *Blencow*, 4 Esp. 27), is competent to contract, and this may form the matter of a replication. So also that the husband is an alien enemy. (*Duchess of Mazarine's case*, 1 L. Raym. 147.) But a replication that the husband was an alien, living abroad, and that the plaintiff contracted with the defendant as a single woman, was held insufficient. (*Stretton* v. *Busnach*, 1 Bing. N. C. 139; and see *Barden* v. *Keverberg*, 2 M. & W. 61.) A replication that the husband became bankrupt and absconded and resided abroad was held bad. (*Williamson* v. *Dawes*, 9 Bing. 292.)

As to the effect of the marriage of the plaintiff or defendant pending the action, see the C. L. P. Act, 1852, s. 141; cited *ante*, p. 408.

As to the position of a married woman, after obtaining a judicial separation, or an order for the protection of her property under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, see ss. 21, 25, 26; and see *ante*, p. 148.

(*b*) No action can be brought on a promise to do an illegal act, or to do

the said promise [*or* agreement, *or* of the acceptance of the said bill, *or, to an indebitatus count,* of contracting the said debt] she was the wife of *G. H.*

Plea, to an action on a bill by the indorsee against the acceptor, that the drawer and indorser was a married woman, and replication that she drew the bill as agent for her husband: Prince v. *Brunatte,* 1 Bing. N. C. 435.

Plea, in action against husband and wife in respect of a liability of the wife dum sola, that before coverture she was discharged under the Insolvent Act: Storr v. *Lee,* 9 A. & E. 868.

Plea, in a like action, of the husband's discharge: Lockwood v. *Salter,* 5 B. & Ad. 303.

Pleas relating to marriage: see post, "*Marriage,*" *p.* 547.

Illegality (*a*).

That a Bond was given for Immoral Cohabitation (*a*).

That the said bond was executed and delivered by the defendant to the plaintiff in consideration of the plaintiff then agreeing with the defendant unlawfully and immorally to cohabit and to commit fornication with the defendant.

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an act with an illegal object. (*Gas Light Co.* v. *Turner,* 5 Bing. N. C. 666, 675.) And no action can be brought on a promise made for an illegal consideration, or on a promise made for a consideration consisting of several parts, some of which are illegal. (*Scott* v. *Gillmore,* 3 Taunt. 226; *Newman* v. *Newman,* 4 M. & S. 66; *Waite* v. *Jones,* 1 Bing. N. C. 662; *Shackell* v. *Rosier,* 2 Bing. N. C. 634; *Higgins* v. *Pitt,* 4 Ex. 312; *Hill* v. *Fox,* 4 H. & N. 359.)

The defence of illegality in the contract must be specially pleaded (r. 8, T. T. 1853); and the objection cannot be raised upon the evidence under the general issue (*Potts* v. *Sparrow,* 1 Bing. N. C. 594; *Martin* v. *Smith,* 4 Bing. N. C. 456), even where it transpires on the plaintiff's own evidence. (*Fenwick* v. *Laycock,* 1 Q. B. 414.)

It is not sufficient to plead generally that the contract was illegal, but the particular facts must be stated from which the illegality, as matter of law, arises. (*Ransford* v. *Copeland,* 6 A. & E. 482.)

If, however, the facts already upon the pleadings are sufficient to show the illegality, the objection may be raised by demurrer. (*Fivaz* v. *Nicholls,* 2 C. B. 501.)

Money paid at the defendant's request in execution of an illegal purpose, and money lent to the defendant to carry out an illegal purpose, cannot be recovered. (*Mortimer* v. *Gell,* 4 C. B. 543; *Cannan* v. *Bryce,* 3 B. & Ald. 179; *M'Kinnell* v. *Robinson,* 3 M. & W. 434; and see *ante,* p. 34, 36.)

(*a*) A bond given to provide for a woman after past illicit cohabitation is valid. (*Nye* v. *Moseley,* 6 B. & C. 133.) A simple contract made under the same circumstances is void for want of consideration. (*Binnington* v. *Wallis,* 4 B. & Ald. 650; *Beaumont* v. *Reeve,* 8 Q. B. 483.) The mere support of

A like plea: Walker v. *Perkins*, 1 W. Bl. 517.

Plea of Illegality, to an Action on a Deed of Separation, in providing for Future Separation.

That at the time of the making of the alleged deed the said *J. K.* was and still is the wife of the defendant, and the defendant and the said *J. K.* were then cohabiting as man and wife; and the said deed was made and executed by the defendant for an illegal purpose then agreed upon by and between the plaintiffs and the defendant, with the privity and consent of the said *J. K.*, that is to say, in order to provide a separate maintenance for the said *J. K.* in case she should thereafter live separate from the defendant and cease to cohabit with him as aforesaid; and the defendant accordingly covenanted with the plaintiffs as alleged as trustees for the said *J. K.* and not otherwise, and the said annual sum of £—— was so covenanted to be paid by the defendant as alleged for such illegal purpose, and as such separate maintenance as aforesaid for the sole use and benefit of the said *J. K.* in the event of her thereafter living separate and apart from the defendant and ceasing to cohabit with him as aforesaid, and upon and for no other cause or consideration.

Plea that the Debt was for Spirits sold in quantities of less value than Twenty Shillings. (24 *Geo. II. c.* 40, *s.* 1; 25 *& 26 Vict. c.* 38.)

That the alleged debt was contracted for and on account of spirituous liquors sold and delivered at divers times by the plaintiff to the defendant, and not otherwise, and no part of the alleged debt was really and *bonâ fide* contracted at any one time, or for such liquors delivered at any one time, to the amount of twenty shillings or upwards, and no part of such liquors was sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart.

A like plea: Hughes v. *Done*, 1 Q. B. 294.

Pleas of Illegality in the Contract itself.

Pleas, to actions on contracts for the sale of goods, that they were sold by illegal weights and measures, contrary to the statutes 5 *Geo. IV. c.* 74, *and* 5 *& 6 Will. IV. c.* 63: *Jones* v. *Giles*, 10 Ex. 119; 11 Ex. 393; *Rosseter* v. *Cahlmann*, 8 Ex. 361; *Hughes* v. *Humphreys*, 3 E. & B. 954.

Plea that the goods sold were coals, and that the plaintiff did not deliver with the coals a ticket of the quantities as required by a local Act: Cundell v. *Dawson*, 4 C. B. 376.

Plea, that the goods sold were excisable liquors sold by retail to

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an illegitimate child by the mother (she being bound by the Poor Laws to do so) is no consideration for a promise to pay for its maintenance (*Crowhurst* v. *Laverack*, 8 Ex. 208); but an undertaking on her part to maintain the child without any recourse to the father, or to supply something beyond mere support, forms a valid consideration. (*Smith* v. *Roche*, 28 L. J. C. P. 237; 6 C. B. N. S. 223; and see *Follit* v. *Koetzow*, 29 L. J. M. 128.)

be consumed on the plaintiff's premises, which were unlicensed, under 9 *Geo. IV. c.* 61, *s.* 18: *Hamilton* v. *Grainger*, 5 H. & N. 40.

Plea, to an action for money lent, that it was lent by the plaintiff as a pawnbroker upon the security of goods, and no note was given under the Pawnbrokers Act, 39 *&* 40 *Geo. III. c.* 99, *s.* 6: *Attenborough* v. *London*, 8 Ex. 661.

Plea, by a licensed dealer in game, that the contract was void under the 1 *&* 2 *Will. IV. c.* 32: *Porritt* v. *Baker*, 10 Ex. 759.

Plea, to an action for work done, that it was done under an illegal contract to build a house in violation of the provisions of the Metropolitan Building Act, 1855, 18 *&* 19 *Vict. c.* 122: *Stevens* v. *Gourley*, 29 L. J. C. P. 1; 7 C. B. N. S. 99.

Pleas that the Plaintiff was not legally qualified to Contract.

Plea, to an action for work done as a surgeon, that the plaintiff had not been duly examined and approved as required by 3 *Hen. VIII. c.* 11: *D'Allax* v. *Jones*, 26 L. J. Ex. 79; *and see* "*The Medical Act,*" 21 *&* 22 *Vict. c.* 90, *ss.* 31, 32; *ante*, p. 196.

Plea, to a count for work done by the plaintiff as a conveyancer, that he was not certificated, and the work was done contrary to 44 *Geo. III. c.* 98; *Taylor* v. *Crowland Gas Co.*, 10 Ex. 293.

Plea, to an action for work, that it was done by the plaintiff as a broker within the City of London, and that he was not duly licensed: Cope v. *Rowlands*, 2 M. & W. 149; *Milford* v. *Hughes*, 16 M. & W. 174; *and see ante*, "*Broker*," *p.* 469.

Plea that work was done by the plaintiff as an appraiser, and that he was not duly licensed: Palk v. *Force*, 12 Q. B. 666.

Plea, to an action by the public officer of a banking partnership, that the partnership was formed for the purpose of banking illegally contrary to the Bank Charter Act, 3 *&* 4 *Will. IV. c.* 98: *Ransford* v. *Copeland*, 6 A. & E. 482.

Plea, to an action for the price of tobacco sold, that the plaintiff was a manufacturer of and dealer in tobacco within the statute 6 *Geo. IV. c.* 81, *and was not licensed: Smith* v. *Mawhood*, 14 M. & W. 452; *and see Johnson* v. *Hudson*, 11 East. 180.

Plea, to an action for the price of printing, that the plaintiff's printing-press was not duly registered as required by statute: Day v. *Hemming*, 9 W. R. Q. B. 703.

Pleas that the Contracts were made for Illegal Purposes.

Plea, to an action for goods sold, that they were sold for the purpose of being consumed in a brothel: Hamilton v. *Grainger*, 5 H. & N. 40 [*and see, as to this defence, Bowry* v. *Bennet*, 1 Camp. 348; *Lloyd* v. *Johnson*, 1 B. & P. 340; *as to the rent of premises let for a brothel, see Appleton* v. *Campbell*, 2 C. & P. 347].

Plea, to an action for use and occupation, that the premises were let for the purpose of being used as a nuisance forbidden by a local Act: Flight v. *Clarke*, 13 M. & W. 155.

Plea, to an action of covenant for rent, that the premises were let for the purpose of being used in a trade forbidden by statute: Gas Light Co. v. *Turner*, 5 Bing. N. C. 666.

Plea, to an action on a guarantee for rent, that the premises were

let to the tenant for the purpose of enabling him to retail excisable liquors without a licence: Ritchie v. *Smith*, 6 C. B. 462.

Plea, to an action upon an agreement to give dramatic representations at the plaintiff's theatre, that the theatre was not licensed under 10 *Geo. II. c.* 28: *Levy* v. *Yates*, 8 A. & E. 129.

Plea, to an action on a bond, that the condition of the bond was illegal, as constituting a combination by mill-owners not to employ workmen except on certain terms, and so in restraint of trade: Hilton v. *Eckersley*, 25 L. J. Q. B. 199; 6 E. & B. 47.

Special replication to a plea of set-off in an action for work and labour, that the set-off consisted of goods delivered in payment of wages contrary to the Truck Act, 1 *&* 2 *Will. IV. c.* 37: *Riley* v. *Warden*, 2 Ex. 59; *and see as to the Truck Act, Chawner* v. *Cummings*, 8 Q. B. 311; *Archer* v. *James*, 31 L. J. Q. B. 153.

A like replication to a plea of accord and satisfaction by the delivery of goods: Sharman v. *Sanders*, 13 C. B. 166; *and see Ingram* v. *Barnes*, 26 L. J. Q. B. 82, 319; 7 E. & B. 115.

Pleas that the alleged contract was made in consideration of compromising a prosecution for an offence: Keir v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Fivaz* v. *Nicholls*, 2 C. B. 501.

Plea that a bond was given to secure money paid to induce an officer in the East India Company's service to resign his commission, contrary to 49 *Geo. III. c.* 126, *s.* 4: *Græme* v. *Wroughton*, 11 Ex. 146.

Other pleas on the ground of illegality: see "Bankruptcy," ante, p. 444; *"Company," ante,* p. 481; *"Gaming," ante,* p. 503; *"Insurance," post,* p. 522; *"Maintenance," post,* p. 547; *"Stockjobbing," post,* p. 583; *"Sunday Trading," post,* p. 584.

Indemnities.

General Issue (*a*).

"Non assumpsit," *ante,* p. 401; "Non est factum," *ante,* p. 403.

(*a*) In actions upon contracts of indemnity the contract is denied by the plea of *non assumpsit* or *non est factum*, according as it is a simple contract or a contract under seal. Any of the above pleas may also be used when applicable.

A set-off cannot be pleaded to an action on a contract of indemnity, where the claim is for unliquidated damages. (*Attwood* v. *Attwood*, 2 E. & B. 23; and see *post*, "*Set-off*.") But where the claim under the indemnity is for money paid, or partly for money paid and partly for unliquidated damages, as on a special count by an accommodation acceptor for the amount of the bill which he has been compelled to pay, and also for costs and expenses incurred, the defendant may plead a set-off as to so much of the count as relates to the money paid, though he cannot plead such a plea to the residue or to the whole declaration. (*Hardcastle* v. *Netherwood*, 5 B. & Ald. 93; *Crampton* v. *Walker*, 30 L. J. Q. B. 19; *Brown* v. *Tibbits*, 31 L. J. C. P. 206.)

Plea denying that the Plaintiff was damnified (a).

That the plaintiff was not damnified [*or as the case may be, traversing the allegation in the declaration in terms*] as alleged.

A general Plea of Non Damnificatus to an Indemnity Bond setting out the Condition.

That the said bond was and is subject to a condition to make void the same if [*here set out the condition*]; and the plaintiff has not at any time since the making of the said bond and condition been in any wise damnified through or by means of any cause or thing in the said condition mentioned. [*If the condition is set out in the declaration and breaches alleged, the plea must traverse the loss or damage in terms, as in the preceding form. As to pleading performance to bonds, see ante,* "*Bonds,*" p. 468.]

Plea that the Plaintiff was damnified by his own Default.

That the plaintiff was damnified as alleged of his own wrong and by and through his own means and default.

Like pleas: Warre v. *Calvert*, 7 A. & E. 154; *White* v. *Ansdell*, 1 M. & W. 348.

Plea that the Defendant did indemnify the Plaintiff.

That he did indemnify and save harmless the plaintiff from the said loss and damage [*or* liability, *as the case may be, traversing in terms the breach alleged*].

Infancy (b).

Plea of the Infancy of the Defendant at the Time of the alleged Contract.

[*If the defendant is an infant at the time of pleading, commence*

(a) Where the declaration alleges generally that the plaintiff was damnified, this general form of plea is applicable; but where the declaration alleges specifically the particulars of the damage, the plea should traverse the particular statements of damage. (1 Wms. Saund. 116 (1).)

(b) The defence of infancy must be specially pleaded (r. 8, T. T. 1853). The plea is available in actions founded on contracts, although the declaration is framed as upon a wrong, as in the case of breaches of duty arising out of contracts; but it cannot be pleaded to actions brought for wrongs independent of contract. (*Jennings* v. *Rundall*, 8 T. R. 335.) It seems that an action at law will not lie against a person for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him. (*Price* v. *Hewett*, 8 Ex. 146; and see *Liverpool Loan Ass.* v. *Fairhurst*, 9 Ex. 422; *Wright* v. *Leonard*, 30 L. J. C. P. 365; *ante*, p. 295 n.) The person guilty of such misrepresentation would be held to his contract in equity (*Ex. p. Unity Joint-Stock Banking Ass.*, 27 L. J. B. 33; *Nelson* v. *Stocker*, 28 L. J. C. 760); but in an action brought upon the contract, the misrepresentation is not a good replication upon equitable grounds to a plea of infancy. (*Bartlett* v. *Wells*, 31 L. J. Q. B. 57; *ante*, p. 486 n.)

The plaintiff may take issue on the plea of infancy, or may reply that the defendant ratified the promise after he became of full age; or, to so much

with the form, ante, p. 386.] That at the time of making the alleged promise [*or* agreement, *or* of the acceptance of the said bill, *or, to an indebitatus count,* of contracting the alleged debt] he was an infant within the age of twenty-one years.

Plea, in an action for calls against the holder of shares in a company, that defendant was an infant at the time of acquiring the shares, and repudiated the shares within a reasonable time after coming of age (*a*): *Cork and Bandon Ry. Co.* v. *Cazenove,* 10 Q. B. 935; *North Western Ry. Co.* v. *M'Michael,* 5 Ex. 114; *Dublin and Wicklow Ry. Co.* v. *Black,* 8 Ex. 181.

A like plea, stating that the defendant repudiated the shares during his minority, and gave notice that he held them at the plaintiff's disposal: Newry and Enniskillen Ry. Co. v. *Coombe,* 3 Ex. 565.

Replication, to a Plea of Infancy, that the Defendant ratified the Promise after he became of Age (*b*).

That the defendant, after he attained his full age of twenty-one years and before action, by a writing made and signed by him, ratified and confirmed the said promise [*or* agreement, *or* acceptance, *or* contract, *or* debt, *as the case may be*] in the declaration mentioned.

Replication that the Debt sued for was incurred for Necessaries supplied to the Defendant (*c*).

[*If the plea is pleaded to other claims besides claims for goods*

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of his claim as relates to necessaries, that they were necessaries suitable to the degree and condition of the infant, as in the above forms.

(*a*) When a person is sued upon obligations arising out of property which he has become possessed of under a contract, as shares in a company, he cannot avoid the obligation by the simple plea of infancy at the time of acquiring the property, but must further plead that within a reasonable time in that behalf after coming of age he repudiated the contract on that ground, and disclaimed the property. (See the cases above cited.)

(*b*) By the 9 Geo. IV. c. 14, s. 5, "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 13, has not taken away the necessity of the ratification being signed by the defendant himself, although it has done so as to cases within the Statute of Limitations. (See *post,* "*Limitations,*" p. 544.) The ratification must be made before action. (*Thornton* v. *Illingworth,* 2 B. & C. 824.)

(*c*) This replication must be confined to such parts of the claim as are for necessaries; as to the residue the plaintiff should take issue on the infancy, reply a ratification or enter a *nolle prosequi.* (See *Wharton* v. *Mackenzie,* 5 Q. B. 606.) As to what are necessaries, see Chitty on Contracts, 6th ed. p. 135; Roscoe, Ev. 10th ed. 450. An infant cannot be charged upon an account stated even for necessaries (*Trueman* v. *Hurst,* 1 T. R. 40; *Ingledew* v. *Douglas,* 2 Stark. 36); but he may ratify an account stated after he becomes of age. (*Williams* v. *Moor,* 11 M. & W. 256). An infant may acknowledge a debt for necessaries, so as to take it out of the Statute of Limitations. (*Willins* v. *Smith,* 4 E. & B. 180.)

sold and delivered, and work done and materials provided, and money paid, limit the replication thus: the plaintiff as to so much of the said plea as relates to the goods sold and delivered, and work done and materials provided, and money paid in the declaration mentioned, says, that at the times of the contracting of the said debts respectively, the said goods, work and materials were necessaries suitable to the then degree, estate and condition of the defendant, and the said money was so paid by the plaintiff in the purchase of necessaries suitable to the then degree, estate and condition of the defendant.

Insanity (*a*).

Plea that the Defendant was Insane at the time of Contracting.

That at the time when the defendant made the alleged promise [*or* agreement, *or* accepted the said bill, *or* executed the alleged deed, *or, to an indebitatus count,* contracted the alleged debt] he was of unsound mind, and thereby incapable of making [*or* accepting, *or* executing, *or* contracting] or understanding the same, as the plaintiff then well knew.

A replication to the same effect (*Beavan* v. *M'Donnell*, 9 Ex. 309; 10 Ex. 184), *and rejoinder that the defendant did not know that the plaintiff was of unsound mind, and that the contract was made fairly and in good faith.* [*This might be shown under a joinder of issue.*]

Replication that the debt was for necessaries supplied to the defendant: Read v. *Legard*, 6 Ex. 637; *and see ante, p.* 516.

Replication to a plea of the Statute of Limitations that the plaintiff was non compos mentis at the time of the accruing of the cause of action: see post, "Limitation," p. 542.

Insolvency (*b*).

(*a*) The insanity of the defendant at the time of contracting, where it was such as to incapacitate him from contracting to the knowledge of the plaintiff, is a defence. (*Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170; *Sentance* v. *Poole*, 3 C. & P. 1; *Dane* v. *Kirkwall*, 8 C & P. 679; *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 17; and see *Elliott* v. *Ince*, 26 L. J. C. 821.) The plea is then equivalent to a plea of fraud, and must be specially pleaded (r. 8, T. T. 1853).

In an action by the indorsee against the maker of a promissory note leave was granted to plead that the indorser was a lunatic at the time of the indorsement. (*Alcock* v. *Alcock*, 3 M. & G. 268.)

Of a similar nature is the defence that the defendant was drunk when he contracted. (See "*Drunkenness*," *ante*, p. 484.)

(*b*) By the Bankruptcy Act, 1861, ss. 19, 20, the jurisdiction in insolvency is abolished, except as to pending proceedings. The forms here given may still be necessary in some cases, and therefore are retained.

Plea of the Defendant's Discharge by an Order of Adjudication under the Insolvent Act. (1 & 2 *Vict. c.* 110, *s.* 91 (*a*).)

That he was duly discharged, according to the statute passed in the second year of the reign of Queen Victoria for amending the laws for the relief of insolvent debtors in England, from the alleged debts and causes of action by an order of adjudication duly made in that behalf by the court for the relief of insolvent debtors in England, which order still remains in force.

A special plea setting out the proceedings and alleging that the defendant was discharged under the Insolvent Act, and that the plaintiff's debt was omitted in the schedule with the consent and by the procurement of the plaintiff: Stracy v. *Blake,* 1 M. & W. 168.

Plea of the Defendant's Discharge under the Insolvent Acts by an Order made in the County Court. (1 & 2 *Vict. c.* 110, *s.* 91, *and* 10 & 11 *Vict. c.* 102, *s.* 10.)

That he was duly discharged, according to the statute passed in the second year of the reign of Queen Victoria for amending the laws for the relief of insolvent debtors in England and other the

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(*a*) The statute 1 & 2 Vict. c. 110, s. 91, enacts, that after any person shall have become entitled to the benefit of that Act by such adjudication as therein provided, if any action shall be brought against such person, his heirs, executors or administrators, for any debt or sum of money with respect to which such person shall have become so entitled, or upon any new contract or security for payment thereof, or upon any judgment obtained against such person for the same, it shall be lawful for such person, his heirs, executors or administrators, to plead generally that such person was duly discharged according to that Act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; whereto the plaintiff may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may show the defendant not to be entitled to the benefit of that Act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff might have replied in case the defendant had pleaded that Act and a dischage by virtue thereof specially.

This defence must be pleaded specially. (*Bircham* v. *Creighton,* 10 Bing. 11.) It may be pleaded as matter arising after the commencement of the action (*Lockwood* v. *Salter,* 5 B. & Ad. 303); or as a plea *puis darrein continuance.* The replication may take issue on the plea.

This general form of plea may also be pleaded to an action brought on any new contract or security for the payment of the debt, and whether such security was given before or after the order of adjudication. (*Payne* v. *Morton,* 8 W. R. Ex. 45.) If the action is brought on a bill or note given for the debt at the suit of a subsequent indorsee, the plea should go on to show that the bill or note was invalid in the hands of the plaintiff by averring that he took it without value, or when overdue, or with notice. (See *Goldsmid* v. *Hampton,* 27 L. J. C. P. 286; 5 C. B. N. S. 94.)

Where a bill is accepted by the defendant partly for a debt discharged under the Act, and partly for a new debt, the above plea must be pleaded to part only. (*Sheerman* v. *Thompson,* 11 A. & E. 1027, where see form of plea; and see *Collins* v. *Benton,* 2 M. & G. 861.) The plea is good where the security is for the old debt, although on an additional consideration. (*Evans* v. *Williams,* 1 C. & M. 30.)

statutes in force for the relief of insolvent debtors in England, from the alleged debts and causes of action by an order of adjudication duly made in that behalf by the county court of ——, holden at ——, then having jurisdiction in the premises, which order still remains in force.

Like pleas: Finney v. *Cecil*, 1 C. B. N. S. 117; *Emery* v. *Clark*, 2 C. B. N. S. 582.

Plea of the Insolvency of the Plaintiff, and the vesting of his Estate in the Assignee by Order of the Insolvent Court. (1 & 2 *Vict. c.* 110, *ss.* 37, 45 (*a*)).

That after the accruing of the alleged debts and causes of action, the plaintiff being a prisoner in actual custody within the walls of the prison of —— in England, within the meaning of the statutes in force for the relief of insolvent debtors in England, duly petitioned the Court for the Relief of Insolvent Debtors in England for his discharge from such custody as aforesaid, according to the provisions of the said statutes; and thereupon such proceedings were had in the matter of the said petition that afterwards the said court ordered that all the real and personal estate and effects of the plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of the plaintiff and his family, and the working tools and implements of the plaintiff not exceeding in the whole the value of twenty pounds, and all the future estate, right, title, interest, and trust of the plaintiff in or to any real and personal estate and effects within this realm or abroad which the plaintiff might purchase, or which might revert, descend, be devised, or bequeathed or come to him before he should become entitled to his final discharge in pursuance of the said statutes according to the adjudication made in that behalf, and all debts due and growing due to the plaintiff before such discharge as aforesaid should be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England; and by virtue of the said order and of the said statutes, and all things necessary in that behalf having happened and been done, the alleged debts and causes of action became and were vested in the said assignee as aforesaid.

Like pleas: Tucker v. *Webster*, 10 M. & W. 371; *Sprye* v. *Porter*, 26 L. J. Q. B. 64; *Kernot* v. *Pittis*, 2 E. & B. 406; *Kernot* v. *Catlin*, 2 E. & B. 790; *Jackson* v. *Burnham*, 8 Ex. 173; *Stanton* v. *Collier*, 3 E. & B. 274.

Plea, in an action by the indorsee of a note against the maker, that before the indorsement the indorser petitioned the Insolvent Court, and by a vesting order all his property was vested in the assignee: Grange v. *Trickett*, 2 E. & B. 395.

(*a*) If the debt sued for has accrued due after the vesting order and before the final discharge, the plea should state that the assignee has interfered and claims the debt, otherwise the plaintiff is entitled to sue for it. (*Jackson* v. *Burnham*, 8 Ex. 173; *Stanton* v. *Collier*, 3 E. & B. 274.)

The C. L. P. Act, 1852, s. 142, cited *ante*, "*Bankruptcy*," p. 439, giving the assignees an option to continue the action, applies only to actions commenced before the insolvency. (*Stanton* v. *Collier*, *supra*.)

Replication, to a plea of the plaintiff's insolvency, that the plaintiff had previously assigned the debt to a third party with notice to the defendant, and that he now sues only as trustee: D'Arnay v. *Chesneau*, 13 M. & W. 796; *Buck* v. *Lee*, 1 A. & E. 804; *Tibbitts* v. *George*, 5 A. & E. 113; *and see Smith* v. *Keating*, 6 C. B. 136; *ante*, "*Bankruptcy*, *p.* 445 (*a*).

Plea of the Defendant's Petition and Final Order for Protection under the Protection Acts. (5 *&* 6 *Vict. c.* 116, *s.* 10; *and see* 7 *&* 8 *Vict. c.* 96, *s.* 22, *and* 10 *&* 11 *Vict. c.* 102, *s.* 4 (*b*).

That after the accruing of the alleged debts and causes of action a petition for the protection of the defendant from process was duly, and according to the form of the statutes in that case made and provided, presented by the defendant to the Court for the Relief of Insolvent Debtors in England [*or*, to the county court of ——, then having jurisdiction in the matter of the said petition]; and a final order for protection and distribution was duly made in the matter of the said petition by a commissioner [*or* the judge] of the said court duly authorized in that behalf; and the alleged debts and causes of action accrued and were contracted before the date of the filing of the said petition, and were inserted with all

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(*a*) The replication may deny the plea by taking issue. A replication, that the plaintiff sued by permission of the assignees and on their behalf, was held bad. (*Swann* v. *Sutton*, 10 A & E. 623.)

A replication that after the vesting order the plaintiff's petition was dismissed was held bad for not showing that this was done before the commencement of the suit. (*Yorston* v. *Fether*, 14 M. & W. 851.) So also a replication, that the plaintiff was subsequently discharged by the consent of his detaining creditors, was held a bad replication, because such discharge does not revest the property without an order from the court. (*Grange* v. *Trickett*, 2 E. & B. 395; *Kernot* v. *Pittis*, 2 E. & B. 406.)

(*b*) The 5 & 6 Vict. c. 116, s. 10, provides "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence."

The final order under 7 & 8 Vict. c. 96, s. 22, has the same effect in barring actions as that under the 5 & 6 Vict. c. 116, s. 10, although the former in terms gives protection to the person only. (*Platel* v. *Bevill*, 2 Ex. 511; *Phillips* v. *Pickford*, 19 L. J. C. P. 171; 1 L. M. & P. 134, overruling *Toomer* v. *Gingell*, 3 C. B. 322.)

The jurisdiction of the Court of Bankruptcy to grant orders for protection from process to insolvent debtors, as established by the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was transferred to the Court for the Relief of Insolvent Debtors in England and to the county courts by 10 & 11 Vict. c. 102, s. 4.

A plea not strictly following the words of the section, nor setting out the proceedings in full, was formerly held bad. (*Leaf* v. *Robson*, 13 M. & W. 651; *Gillan* v. *Deare*, 3 D. & L. 412.) A plea was held bad on general demurrer for not stating that the debt sued for was inserted in the defendant's schedule. (*Phillips* v. *Pickford*, 19 L. J. C. P. 171; 1 L. M. & P. 134; *Kemp* v. *Hurry*, 11 Ex. 47.) The replication may deny this, together with the other matters in the plea, by taking issue.

the necessary particulars respecting the same in the schedule of the defendant's debts annexed to the said petition, according to the provisions of the said statutes.

Like pleas: Cook v. Henson, 1 C. B. 908; *Tyler* v. *Shinton*, 8 Q. B. 610; *Jacobs* v. *Hyde*, 2 Ex. 508; *Platel* v. *Bevill*, 2 Ex. 511; *Nash* v. *Brown*, 18 L. J. C. P. 62; *Lewis* v. *Harris*, 11 Q. B. 724; *Laurie* v. *Bendall*, 12 Q. B. 634; *Kemp.* v. *Hurry*, 11 Ex. 47.

A like plea, stating that the debts were omitted from the schedule with the consent of the plaintiff: Wilkin v. *Manning*, 9 Ex. 575.

Plea of the plaintiff's petition under the Protection Acts, and the vesting of his estates and credits in his assignees (5 & 6 Vict. c. 116, s. 17; 7 & 8 Vict. c. 96, s. 4): *Sayer* v. *Dufaur*, 11 Q. B. 325.

Plea of an arrangement made between the defendant, an insolvent debtor, and his creditors, and a certificate under 7 & 8 Vict. c. 70: Chilcote v. *Kemp*, 3 Ex. 514; *Blackford* v. *Hill*, 19 L. J. Q. B. 346.

Insurance: I. Marine Policies.

General Issue (*a*).

"Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

(*a*) In actions on policies of marine insurance not under seal, the contract of insurance alleged (including the making of the policy by the plaintiff or his agent, the terms of the policy, the subscription of the policy by the defendant, and the payment of the premium as the consideration) is denied by the plea of the general issue, *non assumpsit*, or any equivalent form of words, as, that the defendant did not subscribe the said policy or become an insurer as alleged. (r. 6, T. T. 1853; *Sutherland* v. *Pratt*, 11 M. & W. 296; *Redmond* v. *Smith*, 7 M. & G. 457.) If the policy is under seal, the execution by the defendant of a policy to the effect alleged is denied by the plea of *non est factum*.

The happening of conditions precedent to the claim, as the sailing of the ship, the loss of the ship, the loading of the goods, and the loss of the goods, the interest of the plaintiff in the ship or goods, the compliance with warranties, and also the breaches alleged, must, if disputed, be denied by separate traverses in the terms of the declaration. (See the forms given above, which will be modified to some extent by the circumstances of each particular case.)

All matters in confession and avoidance, as unseaworthiness, misrepresentation, concealment, deviation, etc., must be specially pleaded (r. 8, T. T. 1853).

The statement in the policy of the persons named as interested, or as the consignors or consignees of the property insured, or as the persons who received the orders for and effected the policy, according to the 28 Geo. III. c. 56, s. 1 (*ante*, p. 155), are material, and may be denied in a plea. (*Bell* v. *Janson*, 1 M. & S. 201.)

By the 6 Geo. I. c. 18, two companies, the London Assurance and the Royal Exchange Assurance, were incorporated for the purpose of making marine insurance; and by 11 Geo. I. c. 30, s. 43, they are enabled in all

Plea traversing the Plaintiff's Interest. (19 *Geo. II. c.* 37, *s.* 1) (*a*).

That the plaintiff [*or* the said *G. H.*] was not interested in the said ship and premises [*or* goods] as alleged.

Plea, to an action on a policy with the stipulation that the policy should be considered a sufficient proof of interest, that the ship was a British ship belonging to British subjects (*under* 19 Geo. II. c. 37, s. 1): *Smith* v. *Reynolds*, 25 L. J. Ex. 337; 1 H. & N. 221.

Plea that the name of the defendant as underwriter was not expressed or specified in the policy, under 35 Geo. III. c. 63, s. 2: *Reid* v. *Allan*, 4 Ex. 326; *Hallett* v. *Dowdall*, 18 Q. B. 2. [*This defence may be taken under the general issue:* Ib.]

Plea traversing the Loss.

That the said ship [*or* goods *or* freight] was not [*or* were not, nor was any part thereof] lost by the perils insured against or any of them as alleged.

Plea denying an average loss: see Dawson v. *Wrench*, 3 Ex. 359.

Plea that the Loss was an average Loss within the Exception in the Policy.

That the said goods were [sugar, tobacco, *etc.*] and the alleged loss of the said goods was an average loss under £5 per cent. within the meaning of the said policy, and was not a general average loss, and the said ship during the said voyage was not stranded.

A like plea: Corcoran v. *Gurney*, 1 E. & B. 456.

Plea, to a count on a policy on goods in bulk free from particular average, that a large portion was not lost but safely delivered: Entwistle v. *Ellis*, 2 H. & N. 549; *and see Ralli* v. *I'Anson*, 6 E. & B. 422.

Plea that the repairs, etc., were occasioned by the bad condition of the ship, and not from the perils insured against: Fawcus v. *Sarsfield*, 25 L. J. Q. B. 249.

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actions on any policy "to plead generally that they have not broken the covenants in such policy contained, or any of them," and this privilege has been held not to have been taken away by the 5 & 6 Vict. c. 3. (*Carr* v. *Royal Exchange Ass.*, 31 L. J. Q. B. 93; *ante*, p. 156, *n.*)

(*a*) Insurances made, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, are void by 19 Geo. II. c. 37, cited *ante*, p. 155. The interest at the time of the loss must, if denied, be proved as alleged; the averment of interest at other times is immaterial. (*Rhind* v. *Wilkinson*, 2 Taunt. 237.)

A plea, to an action on a policy on goods lost or not lost, that the loss occurred before the plaintiff acquired any interest, is bad, unless it avers that the plaintiff acquired the interest with a knowledge of the loss. (*Sutherland* v. *Pratt*, 11 M. & W. 296.)

A person who assigns away his interest in the ship or goods before the loss cannot sue upon the policy, except as trustee for the assignee when the benefit of the policy has also been transferred. (*Powles* v. *Innes*, 11 M. & W. 10.)

Plea that the ship was lost by perils from which it was warranted free by the policy: Powell v. *Hyde*, 5 E. & B. 607.

Plea, to a count for a general average loss, that the policy was made with reference to a custom of the trade, that underwriters should not be liable for average on account of jettison of timber stowed on deck, and that the loss was on that account: Miller v. *Titherington*, 30 L. J. Ex. 217.

Plea that the Ship was not Seaworthy (a).

That the said ship, at the commencement of the risk in the said policy mentioned, was not seaworthy for the said voyage.

Plea, to an action on a time policy, that the ship became unseaworthy during the risk, and that the plaintiff was aware of its state and might have repaired it, but neglected to do so, and that the loss was occasioned by such neglect: Hollingworth v. *Brodrick*, 7 A. & E. 40.

Plea that the Ship deviated from the Voyage insured.

That after the commencement of the risk in the said policy mentioned, and before the said loss, the said ship without sufficient cause or excuse did not proceed on the said voyage, and deviated therefrom.

A like plea: Lindsay v. *Janson*, 4 H. & N. 699.

Plea that the ship was unreasonably kept and delayed: Phillips v. *Irving*, 7 M. & G. 325. [*Unreasonable delay is equivalent to a deviation, Ib.*]

Plea that the Policy was obtained by Fraud.

That he was induced to subscribe the said policy and to become such insurer as alleged by the fraud of the plaintiff.

Plea that the Policy was obtained by a Misrepresentation, stating it with Particularity.

That he was induced to subscribe the said policy, and to become such insurer as alleged by the misrepresentation made by the plaintiff to the defendant of a fact then material to be known to the defendant and material to the risk of the said policy, that is to say, [by the misrepresentation that the said ship had sailed from —

(*a*) A warranty of seaworthiness at the commencement of the risk is implied in all voyage policies, but not in time policies. Hence in actions upon policies of the latter kind, the above plea forms no defence. (*Small* v. *Gibson*, 16 Q. B. 128; 4 H. L. Cases, 353; *Michael* v. *Tredwin*, 25 L. J. C. P. 83; 17 C. B. 551; *Fawcus* v. *Sarsfield*, 25 L. J. Q. B. 249; 6 E. & B. 192.) But in an action on a time policy, a plea that the plaintiff knowingly sent the ship to sea in an unseaworthy condition, and thereby occasioned the loss, is a good plea. (See forms of such plea, *Thompson* v. *Hopper*, 6 E. & B. 172; 25 L. J. Q. B. 240; 26 L. J. Q. B. 18; *Michael* v. *Gillespy*, 26 L. J. C. P. 306; 2 C. B. N. S. 627.) A plea that during the risk the ship was rendered unseaworthy by the negligence of the master was held bad. (*Dixon* v. *Sadler*, 5 M. & W. 405; 8 M. & W. 895.)

on the —— day of ——, A.D. ——; whereas the said ship had not sailed from —— on that day, but on the —— day of ——, A.D. ——, *or as the case may be*].

Like pleas: Mackintosh v. *Marshall*, 11 M. & W. 116; *Elkin* v. *Janson*, 13 M. & W. 655; *Anderson* v. *Thornton*, 8 Ex. 425; *Ellis* v. *Lafone*, 8 Ex. 546.

Plea that the Policy was obtained by the wrongful Concealment of a material fact known to the Plaintiff.

That he was induced to subscribe the said policy and to become such insurer as alleged by the wrongful concealment by the plaintiff from the defendant of a fact then known to the plaintiff, and material to be known to the defendant, and material to the risk of the said policy, that is to say [that the said ship had been aground and had sustained serious damage, and was then lying at —— for repairs].

Similar pleas: Russell v. *Thornton*, 4 H. & N. 788; 29 L. J. Ex. 9; *Ellis* v. *Lafone*, 8 Ex. 546.

Plea, to an action on a time policy, that the policy was cancelled on a return of the premium for unexpired time: Baines v. *Woodfall*, 28 L. J. C. P. 338; 6. C. B. N. S. 657.

Plea that the voyage was illegal, in consequence of the ship sailing without the master having obtained a certificate that the cargo was below deck, as required by the Customs Consolidation Act, 1853 (16 & 17 *Vict. c.* 107, *s.* 172), *and that the insurance was effected for the purpose of covering such illegal voyage: Cunard* v. *Hyde*, 27 L. J. Q. B. 408; 29 L. J. Q. B. 6.

Plea that the plaintiff had been indemnified for the same loss by payment under another policy: Morgan v. *Price*, 19 L. J. Ex. 201.

Plea that by the usage of Lloyds, of which the plaintiff had notice, the amount due under the policy was set-off in account with the plaintiff's insurance broker: Stewart v. *Aberdein*, 4 M. & W. 211; *Sweeting* v. *Pearce*, 29 L. J. C. P. 265 (*a*).

Insurance: II. Life Policies.

General Issue (*b*).

"Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

(*a*) The assured, by entrusting the policy to his broker for adjustment, authorizes him to receive payment in cash, but not by set-off in account according to the usage unless he has notice of the usage. (*Sweeting* v. *Pearce*, *supra*; *Scott* v. *Irving*, 1 B. & Ad. 605.)

(*b*) The plea of the general issue is *non est factum* or *non assumpsit*, according to the form of the contract, and denies the execution or the making

Plea traversing the Plaintiff's Interest in the Life insured. (14 *Geo. III. c.* 48, *s.* 1; *see ante, p.* 161.)

That at the time of the making of the said policy the plaintiff was not interested in the life of the said *G. H.* as alleged.

Plea that the policy made in the name of the deceased was made by the plaintiff for his own use and benefit, and that he had no interest in the life of the deceased: Shilling v. *Accidental Death Co.*, 26 L. J. Ex. 266; 27 L. J. Ex. 16; 2 H. & N. 42.

Plea that the name of the person interested in the policy was not inserted therein as the name of the person interested under the 14 Geo. III. c. 48, s. 2: *Hodson* v. *Observer Life Assurance Society*, 8 E. & B. 40; 26 L. J. Q. B. 303.

Pleas of non-payment of premiums subsequent to the first: Sheridan v. *Phœnix Life Ass. Co.*, 27 L. J. Q. B. 227; *Prince of Wales Ass. Co.* v. *Harding*, 27 L. J. Q. B. 297.

Plea that the premium was not paid at the day, but during the days of grace allowed for renewal of the policy, and was received by the defendants in ignorance that the life had previously died: Pritchard v. *Merchants' Ins. Soc.*, 27 L. J. C. P. 169; 3 C. B. N. S. 622.

Plea that the Policy was obtained by Fraud.

That the defendants were induced to make the said policy by the fraud of the plaintiff.

Plea that the Defendants were not informed of a Material Fact known to the Plaintiff.

That at the time of making the said policy the plaintiff omitted to inform the defendants of a fact then material to the risk of the said policy, and then material to be known to the defendants; that is to say [that the said *G. H.* had had and was then subject to a disease called *delirium tremens*], as the plaintiff then well knew, but of which the defendants were then ignorant.

Like pleas: Huckman v. *Fernie*, 3 M. & W. 506; *and see Lindenau* v. *Desborough*, 8 B. & C. 586; *Jones* v. *Provincial Insurance Co.*, 26 L. J. C. P. 272; 3 C. B. N. S. 65.

Plea that the Declaration made as to the Health of the Person insured was False (*a*).

That a material fact stated in the declaration in the said policy

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of a policy to the effect alleged. The policy generally contains an acknowledgment of the payment of the first premium. Non-payment of a subsequent premium must be denied in terms. The interest of the plaintiff in the life insured, and the happening of all conditions precedent to the claim, whether particularly averred, as the death, or comprised in the general averment of performance, must be specifically traversed. All matters in confession and avoidance must be pleaded specially (r. 8, 10, 12, T. T. 1853).

(*a*) Where a person insures the life of another the latter person is the

mentioned and thereby agreed to be the basis of the said insurance was untrue, that is to say [that at the time of the delivering of the said declaration to the defendants, the said *G. H.* was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life, whereas the said *G. H.* was not then in a good state of health, but was then afflicted with a disease or disorder, that is to say ——, tending to shorten life].

Like pleas: Foster v. *Mentor Life Ass. Co.*, 3 E. & B. 48; *Ashby* v. *Bates*, 4 D. & L. 33; *Geach* v. *Ingall*, 14 M. & W. 95; *Wood* v. *Dwarris*, 55 L. J. Ex. 129; 11 Ex. 493; *Wheelton* v. *Hardisty*, 26 L. J. Q. B. 265; 27 L. J. Q. B. 241; 8 E. & B. 232; *Jones* v. *Provincial Insurance Co.*, 26 L. J. C. P. 272; 3 C. B. N. S. 65.

Pleas that the policy was subject to the condition, that any fraudulent or untrue statements in any of the documents relating thereto should avoid the policy, and that fraudulent and untrue statements were contained in the documents: Cazenove v. *British Equitable Ass. Co.*, 28 L. J. C. P. 259.

Replication to the above plea on equitable grounds, that the company published a prospectus, whereby they undertook that all their policies should be indisputable except in case of fraud, and that the alleged untrue statement was not fraudulent: Wood v. *Dwarris*, 25 L. J. Ex. 129; 11 Ex. 493; *Wheelton* v. *Hardisty*, 26 L. J. Q. B. 265; 8 E. & B. 232.

Plea that the person whose life was insured departed beyond Europe, whereby the policy was avoided: Reis v. *Scottish Equitable Soc.*, 26 L. J. Ex. 279; 2 H. & N. 19. [*In this case leave to plead a replication on equitable grounds that he did so with the leave and licence of the insurers, was refused.*]

Plea that the person whose life was insured died by his own hand, whereby the policy became void: Borradaile v. *Hunter*, 5 M. & G. 639; *Moore* v. *Woolsey*, 4 E. & B. 243 (*a*).

Replication that a third party had acquired a bonâ fide interest in the policy by assignment for value, whereby it remained in force to the extent of such interest by virtue of a condition in the policy: Moore v. *Woolsey*, 4 E. & B. 243; *and see Jones* v. *Consolidated Ass. Co.*, 28 L. J. C. 66 [*an assignment by bankruptcy is not within the terms of such a condition: Jackson* v. *Forster*, 28 L. J. Q. B. 166; 29 L. J. Q. B. 8; 1 E. & E. 463].

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agent of the former for the purpose of making the required declarations, though he is not the agent for the purpose of effecting the policy. (*Everett* v. *Desborough*, 5 Bing. 503; *Huckman* v. *Fernie*, 3 M. & W. 505.) The falsehood of the declaration is no defence unless it is incorporated in the contract as a condition or warranty, or unless fraudulently false. (*Wheelton* v. *Hardisty*, 27 L. J. Q. B. 241; 8 E. & B. 232.)

(*b*) As to death by suicide, see further, *Schabe* v. *Clift*, 2 C. & K. 134; *Dufaur* v. *Professional Life Ass. Co.*, 27 L. J. C. 817; *Horn* v. *Anglo-Australian Ass. Co.*, 30 L. J. C. 511. As to death by the hands of public justice, see *Amicable Ass. Soc.* v. *Bolland*, 2 Dow. & Cl. 1.

Insurance: III. Fire Policies.

General Issue (*a*).

"Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

Plea traversing that the Premises were burnt.

That the said dwelling-house, furniture, goods and premises were not, nor was any of them, burnt or destroyed by fire as alleged.

Plea traversing the plaintiff's loss or damage: London and North-Western Ry. Co. v. *Glyn*, 28 L. J. Q. B. 188; 1 E. & E. 652.

Plea traversing the Plaintiff's Interest in the Premises.

That the plaintiff was not at the time of the alleged damage and loss interested in the said dwelling-house, furniture, goods, and premises, or any of them, as alleged.

Plea that the Plaintiff did not give Notice of the Loss according to a Condition of the Policy.

That the plaintiff did not forthwith give notice of the alleged damage and loss to the defendants at their said office, according to the said condition in that behalf indorsed on the said policy.

Plea that the Plaintiff did not give in an Account of his Loss to the Office, according to a Condition of the Policy.

That the plaintiff did not, within —— days after the alleged loss, deliver in as particular an account of the alleged loss or damage as the nature of the case admitted of, according to the said condition in that behalf indorsed on the said policy.

That the Plaintiff did not produce Proof of his Loss according to a Condition of the Policy.

That the plaintiff did not, although he was after the alleged loss reasonably required by the said company so to do, make proof by his books of account or other proper vouchers, of the alleged loss and damage according to the said condition in that behalf indorsed on the said policy.

That the Plaintiff delivered a Fraudulent Account of the Loss.

That after the alleged loss and damage the plaintiff made and delivered to the defendants a false and fraudulent account of the al-

(*a*) The plea of the general issue is *non est factum* or *non assumpsit*, according to the form of the policy. The traverses of the performance of the conditions will depend upon the allegations in the declaration; the performance of those only which are material and precedent to the right of action can be denied. If the declaration improperly omits to state, or states in general terms any material condition precedent, the defendant must plead as directed, *ante*, p. 483 n. (*a*).

leged loss and damage as and for such account as is mentioned in the said condition in that behalf indorsed on the said policy, in which said account he represented and stated that insured goods and property of the plaintiff to the amount of £—— had been burnt and destroyed by the said fire, and that his loss and damage by the said fire were to the said amount of £——, with intent to induce the defendants to pay the plaintiff the said amount of £——; whereas insured goods and property of the plaintiff had not been burnt or destroyed by the said fire to the amount of £——, and his said loss and damage were not to that amount, as the plaintiff then well knew.

Plea that the Policy was obtained by Fraud.

That the defendants were induced to make the said policy by the fraud of the plaintiff.

Plea that a material circumstance known to the plaintiff, namely, that a furnace was fixed on the premises, was not communicated to the defendants: Pim v. *Reid*, 6 M. & G. 1.

Plea that the premises did not agree with the description warranted: Sillem v. *Thornton*, 3 E. & B. 868; *Baxendale* v. *Harvey*, 4 H. & N. 445.

Plea of Alteration of the Risk.

That after the making of the said policy and before the said loss the plaintiff, without the knowledge or consent of the defendant, materially altered the said insured premises so as thereby to vary and increase the risk, that is to say [by erecting thereon a stove and apparatus for heating the said premises with hot air].

A like plea: Sillem v. *Thornton*, 3 E. & B. 868.

Pleas that the risk was altered by the erection of a steam-engine, and by the introduction of a dangerous process: Stokes v. *Cox*, 25 L. J. Ex. 291; 26 L. J. Ex. 113; 1 H. & N. 533; *Glen* v. *Lewis*, 8 Ex. 607.

Plea that after the insurance a dangerous trade was carried on on the premises, of which the defendants were not informed: Pim v. *Reid*, 6 M. & G. 1.

Plea that a quantity of dangerous materials was deposited on the premises without the knowledge of the defendants: Ib.

INTOXICATION. See "*Drunkenness*," *ante*, p. 484.

JUDGMENTS, ACTIONS ON (*a*).

Plea of Nul Tiel Record.

That there is not any record of the alleged judgment remaining in the said court here [*or*, in the said court of ——].

(*a*) If the plaintiff disputes the existence of the judgment or the effect of

A like plea with the proceedings thereon: Hopkins v. *Francis*, 13 M. & W. 668.

Replication to the Plea of Nul Tiel Record where the Record is of the same Court (a).

That there is a record of the said judgment remaining in the said court here as the plaintiff has above alleged; and the plaintiff prays that the said record may be inspected by the court here; and a day is given to the said parties here until the —— day of ——, A. D. ——, to hear judgment thereon, etc.

Replication to the Plea of Nul Tiel Record where the Record is of another Court.

That there is a record of the said judgment remaining in the said court of —— as the plaintiff has above alleged, and the plaintiff prays that the said record may be inspected by the court here; and hereupon the plaintiff is commanded that he have the same here on

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it as stated in the declaration, he must plead *nul tiel record*. (See *Cocks* v. *Brewer*, 11 M. & W. 51.)

To an action on a judgment the defendant cannot plead any facts which might have been pleaded as an answer to the original action. (1 Chit. Pl. 7th ed. 512.) Nor can he plead any of those facts which would merely afford a ground for application to the summary jurisdiction of the court to set aside the judgment. Any matter which would entitle the defendant to an absolute and unconditional injunction in equity might be set up by way of equitable defence. Matter for a writ of error cannot be pleaded in bar in an action on a judgment, but the defendant must resort to his writ of error. (*Dick* v. *Tolhausen*, 4 H. & N. 695.)

A plea of payment in an action upon a judgment was not good at common law, because payment was matter *in pais* and not of record. But by the statute 4 & 5 Anne, c. 16, s. 12, it is enacted that "Where any action of debt shall be brought upon any judgment, if the defendant hath paid the money due upon such judgment, such payment shall and may be pleaded in bar of such action." The statute does not authorize a plea of accord and satisfaction. (1 Chit. Pl. 7th ed. 512.)

A release may be pleaded in bar to an action on a judgment. (*Barker* v. *St. Quintin*, 12 M. & W. 441.)

(*a*) Where a plea consists of matter of record, and also of matters of fact, it seems to be the proper course to take issue upon it. (*King* v. *Hoare*, 13 M. & W. 494; *Boyce* v. *Webb*, 15 Q. B. 84; Chit. Forms, 9th ed. p. 464.)

Under this and the following replication the plaintiff should give notice to the defendant that he will produce the record on the day therein mentioned. By r. 38, H. T. 1853, "On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record otherwise judgment." As to the form of the replications and the proceedings thereupon, see 1 Chit. Pl. 7th ed. 626; Chit. Forms. 9th ed. 463; 2 Chit. Pr. 11th ed. 924.

Upon a trial by the record the court can amend the declaration under the C. L. P. Act, 1852, s. 222, by inserting the true date of the judgment recovered (*Noble* v. *Chapman*, 14 C. B. 400); or the true amount recovered. (*Hunter* v. *Emmanuel*, 15 C. B. 290.)

the —— day of ——, A. D. ——, and the same day is given to the defendant at the same place, etc.

Plea that the Plaintiff took the Defendant in Execution under the Judgment (a).

That after the recovery of the said judgment the plaintiff for having satisfaction thereof caused to be issued out of the said court of —— a writ of *capias ad satisfaciendum* upon the said judgment directed to the sheriff of ——, whereby the said sheriff was commanded (*set out the writ and indorsement as ante*, p. 345), and the plaintiff caused the said writ so indorsed to be delivered to the said sheriff to be executed; and by virtue thereof the said sheriff afterwards and before this suit duly took the defendant in execution, and had and kept him in his custody to satisfy the plaintiff in the said action.

Like pleas: National Assurance Association v. *Best*, 2 H. & N. 695; 27 L. J. Ex. 19; *Collins* v. *Beaumont*, 10 A. & E. 225; *M'Cormick* v. *Melton*, 1 C. M. & R. 525; *Cattlin* v. *Kernott*, 27 L. J. C. P. 186; 3 C. B. N. S. 796.

Plea by a garnishee that the judgment creditor took the judgment debtor in execution under the judgment: Juaralde v. *Parker*, 30 L. J. Ex. 237.

Replication to a plea, of execution by ca. sa. that the writ was set aside for irregularity and the defendant discharged: M'Cormick v. *Melton*, 1 C. M. & R. 525; *and see post*, "*Process*," ch. 6.

Replication to a like plea, that the defendant obtained his discharge by fraud: Cattlin v. *Kernott*, 27 L. J. C. P. 186; 3 C. B. N. S. 796.

Pleas to Actions on Foreign Judgments (b).

Plea, to an action on a foreign judgment, that the defendant was not served with process, and had no notice of the former action and

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(*a*) The merely taking the defendant in execution under a *ca. sa.* without a subsequent discharge is a good plea; because such taking is an election by the plaintiff to pursue that remedy and no other. (*Thompson* v. *Parish*, 28 L. J. C. P. 153; 5 C. B. N. S. 685.) If the judgment-creditor subsequently consent to discharge the defendant, it is a complete satisfaction of the judgment, unless the consent was obtained by fraud. (*Cattlin* v. *Kernott*, 27 L. J. C. P. 186; 3 C. B. N. S. 796.)

(*b*) A final judgment of a foreign court is conclusive between the parties on the merits, and no matter can be pleaded to it which might have been pleaded in the original action (*Henderson* v. *Henderson*, 6 Q. B. 288; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Castrique* v. *Imrie*, 29 L. J. C. P. 321; 8 C. B. N. S. 1, 405); pleas that the judgment was erroneous in law and in fact upon the merits; that fresh evidence had been discovered since the judgment, showing it to be erroneous; that evidence was admitted which was not admissible by the law of England, were held bad (*De Cosse Brissac* v. *Rathbone*, 30 L. J. Ex. 238); but the defendant in the foreign suit may allege in answer to it in this country, that the foreign court had no jurisdiction in the subject-matter of the suit, or that he was not served

no opportunity of defending himself: Reynolds v. *Fenton*, 3 C. B. 187; *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *Vallée* v. *Dumergue*, 4 Ex. 290; *Meeus* v. *Thellusson*, 8 Ex. 638.

Like plea to an action on a decree of the court of session in Scotland: Cowan v. *Braidwood*, 1 M. & G. 882.

Like plea to an action on an Irish judgment: Ferguson v. *Mahon*, 11 A. & E. 179; *Sheehy* v. *Professional Ass. Co.*, 26 L. J. C. P. 301; 27 L. J. C. P. 233; 13 C. B. 787; 3 C. B. N. S. 597; *where see a replication of substituted service on an agent under* 13 & 14 *Vict. c.* 18, *s.* 9.

A like plea to an action on a judgment of a colonial court: Bank of Australasia v. *Nias*, 16 Q. B. 717.

Plea that by the foreign law the judgment sued on was not final: Patrick v. *Sheddon*, 2 E. & B. 14.

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Judgment recovered.

Plea of Judgment recovered by the Plaintiff in a Superior Court for the same Debt (*a*).

The judgment was signed on the —— day of —— A.D. ——; the number of the roll is ——.

That the plaintiff heretofore, in the Court of —— at Westminster, sued the defendant in an action for the same debt [*or* cause of action] as in the declaration alleged, and such proceedings were thereupon had in that action, that the plaintiff afterwards by the judgment of the said

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with process and had no opportunity to answer, or that the judgment was fraudulently obtained. (*Bank of Australasia* v. *Nias*, *supra.*) He may also rely upon error appearing upon the face of the judgment, showing that the court had arrived at a wrong conclusion either of law or of fact (*Novelli* v. *Rossi*, 2 B. & Ad. 757; *Reimers* v. *Druce*, 26 L. J. C. 196; 23 Beav. 150); and see other grounds on which foreign judgments may be impeached, *ante*, p. 167.

An appeal pending in the foreign count is not a good plea to an action on a foreign judgment, though it may be a ground for staying execution upon equitable terms. (*Munroe* v. *Pilkington*, 31 L. J. Q. B. 81.)

(*a*) By r. 10, H. T. 1853, "where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record the number of the roll in which such proceedings are entered, if any, and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea."

This rule does not apply to judgments pleaded incidentally to the defence, as a plea by an executor of an outstanding judgment and no assets beyond (*Power* v. *Izod*, 1 Bing. N. C. 304); or a plea that the debt had been recovered as a set-off in a former action. (*Brokenshir* v. *Monger*, 9 M. & W. 111.) And see Chit. Pr. 11th ed. 924, as to the proceedings on this plea. If the plea is inconsistent with the declaration, as by setting up a judgment prior

court recovered against the defendant £—— for the said debt [*or* cause of action], and his costs of suit in that behalf; and the said judgment still remains in force.

Plea of judgment recovered against a joint contractor with the defendant: King v. *Hoare*, 13 M. & W. 494 (*a*).

Plea that a former action for the same cause was settled on payment of the debt and costs: Power v. *Butcher*, 10 B. & C. 329; *Ross* v. *Jacques*, 8 M. & W. 135.

Plea of Judgment recovered by the Plaintiff in a County Court for the same Debt (*b*).

The judgment was entered on the —— day of ——, A.D. ——; the number of the plaint is ——.

That the plaintiff heretofore, in the county court of ——, holden at ——, then being a court duly constituted and holden under the statutes relating to the county courts, and then having jurisdiction in respect of the debt [*or* cause of action] in the declaration mentioned, levied a plaint against the defendant for the same debt [*or* cause of action] as in the declaration mentioned; and such proceedings were there-

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in date to the alleged cause of action, the plea would be demurrable. (*Few* v. *Backhouse*, 8 A. & E. 789.)

As to what claims are covered by a judgment in a former action, see *Bagot* v. *Williams*, 3 B. & C. 235; *Florence* v. *Jenings*, 26 L. J. C. P. 274; 1 C. B. N. S. 584; *Duchess of Kingston's case*; 2 Smith's L. C. 5th ed. 642. A plea of judgment recovered on a promissory note given for and on account of a debt, was held a bad plea to an action for the debt. (*Drake* v. *Mitchell*, 3 East. 251.) As to the effect of a decree in equity on the subject-matter of the suit, see "*Equitable Pleas*," *ante*, p. 333.

(*a*) By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 11, a person having a cause of action against joint-debtors "shall not be barred from commencing and suing any action or suit against the joint-debtor or joint-debtors who was or were beyond seas at the time the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

(*b*) The county court is a court of record (9 & 10 Vict. c. 95, s. 3), and therefore the r. 10, H. T. 1853, cited *supra*, requiring a marginal note of the judgment, applies to the above plea. As to the form of the marginal note, see the Rules and Orders of the County Courts, No. 7, Sched. No. 45.

The County Courts Act, 9 & 10 Vict. c. 95, s. 89, enacts that every order and judgment of any court holden under that Act, except as therein provided, shall be final and conclusive between the parties, subject to the power of the judge to nonsuit the plaintiff or to order a new trial. (See *Routledge* v. *Hislop*, 29 L. J. Q. B. 104.)

By the 13 & 14 Vict. c. 61, s. 18, it is enacted "that if any party shall sue another in any county court for any debt or other cause of action for which he hath already sued him, and obtained judgment, in any other court, the proof of such former suit having been brought and judgment obtained may be given, and the party so suing shall not be entitled to recover in such second suit, and shall be adjudged to pay three times the costs of such second suit to the opposite party."

upon had in the said court in the matter of the said plaint, that the plaintiff afterwards by the judgment of the said court recovered against the defendant £—— for the said debt [*or* cause of action] and his costs of suit in that behalf; and the said judgment still remains in force.

A like plea: Austin v. *Mills*, 9 Ex. 288.

Pleas in estoppel, of judgment recovered against the plaintiff (a): Palmer v. *Temple*, 9 A. & E. 508; *Gordon* v. *Whitehouse*, 25 L. J. C. P. 300; 18 C. B. 747; *see ante* "*Estoppel*," *p.* 491.

Plea of a previous judgment against the plaintiff on demurrer: Hutt v. *Morrell*, 3 Ex. 240.

Plea in estoppel, that in a former action between the same parties the now plaintiff relied on a set-off in respect of the debt now sued for, which was found against him: Eastmure v. *Laws*, 5 Bing. N. C. 444.

Plea of judgment recovered by the plaintiff in a consular court abroad, and payment of the sum recovered: Barber v. *Lamb*, 29 L. J. C. P. 234; 8 C. B. N. S. 95.

Pleas in estoppel, of a foreign judgment recovered against the plaintiff (b): Plummer v. *Woodburne*, 4 B. & C. 625; *and see General Steam Navigation Co.* v. *Guillou*, 11 M. & W. 877; *Callandar* v. *Dittrich*, 4 M. & G. 68; *Frayes* v. *Worms*, 10 C. B. N. S. 149.

(*a*) The plea of judgment recovered against the plaintiff is a plea in estoppel, and should be so pleaded. (*Vooght* v. *Winch*, 2 B. & Ald. 662; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; see the form in full, "*Estoppel*," *ante*, p. 491.) A judgment recovered against the defendant operates as a merger of the original cause of action, and is pleaded in bar as above. (*Smith* v. *Nicolls*, 5 Bing. N. C. 220.) Where the plaintiff has recovered judgment in a former action for part of the debt claimed, and failed as to the residue, in a second action for the same debt it is sufficient for the defendant to plead the judgment recovered against him according to the fact. (*Todd* v. *Stewart*, 9 Q. B. 759.)

(*b*) A final judgment against the plaintiff in a foreign court is a good plea by way of estoppel. (*Plummer* v. *Woodburne*, 4 B. & C. 625; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; *Ricardo* v. *Garcias*, 12 Cl. & F. 368); but the plea must show that the judgment is final and conclusive between the parties, according to the law of the country where it was pronounced. (*Ib.*; *Frayes* v. *Worms*, 10 C. B. N. S. 149.) A judgment against the defendant in a foreign court does not operate as a merger of the original cause of action, and if not followed by execution or satisfaction is no defence. (*Smith* v. *Nicolls*, 5 Bing. N. C. 208; *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 16 Q. B. 717.) If pleaded with payment of the sum recovered, it is a good plea. (*Barber* v. *Lamb*, 29 L. J. C. P. 234; 8 C. B. N. S. 95.) As to the effect of a foreign judgment and the grounds on which it may be impeached, see *ante*, "*Pleas to Actions on Foreign Judgments*," p. 530. Replications to pleas of foreign judgments may be framed from the pleas there given.

Replication of Nul Tiel Record to a Plea of Judgment recovered in the same Court (*a*).

That there is not any record of the alleged judgment remaining in the said court here; and the court here will advise themselves upon the inspection of the record above alleged; and a day is given to the said parties here until the —— day of ——, A.D. ——, to hear judgment thereon, etc.

Replication of Nul Tiel Record to a Plea of Judgment recovered in another Court.

That there is not any record of the alleged judgment remaining in the said court of ——; and hereupon the defendant is commanded that he have the said record here on the —— day of ——, A.D. ——; and the same day is given to the plaintiff at the same place, etc.

New Assignment to a Plea of Judgment recovered (*b*).

[*Commence with one of the forms, ante, p.* 393, *as the case may require.*] Other debts [*or* causes of action] than those in the plea mentioned, and in respect whereof the said judgment was recovered as aforesaid.

JURISDICTION (*c*).

(*a*) Under this and the following replication a notice may be given requiring the defendant to produce the record. (See *ante*, p. 529 (*a*).)

(*b*) On a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue. If the judgment were recovered for another cause there must be a new assignment. (Per Parke, B., *King* v. *Hoare*, 13 M. & W. 494, 503.) A replication is sometimes pleaded in the form of a traverse, that the judgment was not in respect of the same causes of action as in the declaration mentioned. (See *Seddon* v. *Tutop*, 6 T. R. 607; *Lord Bagot* v. *Williams*, 3 B. & C. 235; *Bristowe* v. *Fairclough*, 1 M. & G. 143; *Todd* v. *Stewart*, 9 Q. B. 759; *Gordon* v. *Whitehouse*, 18 C. B. 747; 25 L. J. C. P. 300; *Florence* v. *Jennings*, 1 C. B. N. S. 584; 26 L. J. C. P. 274.) But it is conceived that it is substantially a new assignment, and should be pleaded as such in order to give the defendant an opportunity of answering it. (See *post*, "*New Assignment*," p. 553.)

(*c*) *Jurisdiction.*]—Pleas to the jurisdiction take exception to the jurisdiction of the court in which the action is brought. They are of unfrequent occurrence in the superior courts. (See *Hunter* v. *Neck*, 3 M. & G. 181, 188.) Matter of objection to the jurisdiction of the court may generally be pleaded in bar, or given in evidence under the general issue. (1 Chit. Pl. 7th ed. 458.) If pleaded to the jurisdiction, it must be pleaded in person and not by attorney. (1 Chit. Pl. 7th ed. 460; and see *Hunter* v. *Neck*, 3 M. & G. 181.) It must be pleaded within four days after declaration, and must be supported by an affidavit of the truth of its contents. (4 Anne, c. 16, s. 11.) Precedents of such pleas will be found in Steph. Pl. 5th ed. 51; 3 Chit. Pl. 7th ed. 8.

A writ of prohibition lies from the superior courts to the judge, and

Landlord and Tenant.

General Issue (*a*).

"Never indebted," *ante*, p. 397; "Non est factum," *ante*, p. 403.

Traverse of the Demise, not being by Deed.

That the plaintiff did not let to the defendant the said house upon the terms alleged.

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parties to a suit in any inferior court, commanding them to cease from prosecuting the suit, where it is not within the jurisdiction of the inferior court (3 Bl. Com. 112); and the objection may also, in general, be taken by plea or otherwise in the inferior court. But by the Mayor's Court of London Procedure Act, 1857, 20 & 21 Vict. c. 157, s. 15, no defendant is permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea; and since this enactment a defendant in that court cannot obtain a prohibition to stay the proceedings. (*Manning* v. *Farquharson*, 30 L. J. Q. B. 22.)

As to prohibitions of actions in the county courts, see Pollock's County Court Practice, 4th ed. 185.

(*a*) The form of the general issue in actions between landlord and tenant varies with the form of the declaration. The form of general issue appropriate to the count for use and occupation (*ante*, p. 169) is *never indebted.* Where the count is framed on the terms of the tenancy, as in the forms *ante*, p. 172, the defendant may traverse a tenancy on the terms alleged. Where the count charges a demise not under seal, the proper mode of denying the contract is by a traverse of the demise. If the demise is by deed, the contract is denied by the plea of *non est factum.*

The general issue pleaded to the indebitatus count for use and occupation denies that the defendant held and occupied the premises under the plaintiff during the period of time for which the rent is claimed. Under it the defendant may prove that the tenancy was under a lease by deed; but it is not sufficient for him to show an express contract not by deed. (*Gibson* v. *Kirk*, 1 Q. B. 850; see *ante*, p. 169 (*a*).) The defendant may also give in evidence under this plea a surrender (*Dodd* v. *Acklom*, 6 M. & G. 672), or an eviction by the plaintiff or by title paramount before the rent accrued due (*Prentice* v. *Elliott*, 5 M. & W. 606); a partial eviction may have the same operation as an eviction from the whole in suspending the rent. (*Upton* v. *Townend*, 17 C. B. 30.) Under this issue the defendant may show a judgment in ejectment recovered by a third party, and his own attornment as tenant to the latter in answer to a claim in respect of a subsequent occupation of the premises. (*Newport* v. *Hardy*, 2 D. & L. 921.) So also he may show a claim of the rent by a mortgagee and an attornment to him as tenant, in answer to a claim by the mortgagor in respect of a subsequent occupation. (*Pope* v. *Biggs*, 9 B. & C. 245; *Waddilove* v. *Barnett*, 2 Bing. N. C. 538.) A mere claim in such case not acted upon by the defendant by attornment or payment of the rent or quitting the premises would form no defence (*Wilton* v. *Dunn*, 17 Q. B. 294; *Hickman* v. *Machin*, 28 L. J. Ex. 310; 4 H. & N. 716); and a voluntary surrender of the premises to a third party under an alleged claim forms no defence. (*Emery* v. *Barnett*, 4 C. B. N. S. 423: 27 L. J. C. P. 217.)

If the mortgagee claims any arrears of rent in respect of past occupation and the defendant pays him the arrears, such payment is a good defence to a claim by the mortgagor for the same rent; but, being matter in confession

Plea, to an action on an indenture of lease, that the lessor did not execute it: Pitman v. *Woodbury*, 3 Ex. 4; *Swatman* v. *Ambler*, 8 Ex. 72 (*a*).

Traverse of the Tenancy, not being under a Demise by Deed.

That he was not tenant to the plaintiff of the said messuage and premises upon the terms alleged.

Traverse that the Rent became due (*b*).

That no part of the said rent had at the commencement of this suit become due as alleged.

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and avoidance, it must be specially pleaded. (*Waddilove* v. *Barnett, supra; Newport* v. *Hardy, supra; Johnson* v. *Jones*, 9 A. & E. 809.)

Where the defendant has taken the premises for a term, it is no defence that they were not capable of occupation in the manner for which they were let (*Sutton* v. *Temple*, 12 M. & W. 64); except perhaps in the case of a ready-furnished house which was not in a state fit for habitation. (*Smith* v. *Marrable*, 11 M. & W. 5; and see *Hart* v. *Windsor*, 12 M. & W. 68.) It is no defence that the premises consisted principally of buildings, which were destroyed by fire; and in such case it is no defence on equitable grounds that the landlord insured the premises and received the amount insured, but has not laid it out in rebuilding. (*Loft* v. *Dennis*, 1 E. & E. 474.)

Where the declaration is special, matters showing the termination of the contract, as surrender, eviction, etc., cannot be given in evidence under a traverse of the contract or tenancy, but must be pleaded specially.

The breaches charged in the declaration must be denied by traverses in terms of the allegations.

(*a*) Covenants which depend on the existence of the term, such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute the lease, because the term has not been created to which such covenants are annexed, and during which only they operate. (*Pitman* v. *Woodbury*, 3 Ex. 4; and see *Swatman* v. *Ambler*, 8 Ex. 72; *Pistor* v. *Cater*, 9 M. & W. 315.) Such defence must be specially pleaded. (*Morgan* v. *Pike*, 14 C. B. 473.) Under a traverse of the demise the lease would be proved by the production of the counterpart executed by the lessee. (*Houghton* v. *Kœnig*, 18 C. B. 235; 25 L. J. C. P. 218.) A plea to an action for rent, that the deed of demise was cancelled with the consent of the plaintiff and the defendant, was held bad as to the rent previously accrued due. (*Ward* v. *Lumley*, 29 L. J. Ex. 322.)

(*b*) The plea of *riens in arrear*, which is a good plea in bar to an avowry or cognizance in replevin (see *post*, "*Replevin*," c. 6), is not properly applicable in any other action. It was always held to be a bad plea to a count in covenant for the non-payment of rent, because it confesses the breach of the covenant to pay *ad diem*, and only tends to mitigate the damages; but it was held formerly to be a good plea to a count in debt for rent, on the ground that it was equivalent to the plea of *nil debet*. (*Warner* v. *Theobald*, 2 Cowp. 588.) The plea of *nil debet*, however, by the R. G. H. T. 4 Will. IV., and since by the r. 11, T. T. 1853, is not allowed in any action; it would seem therefore that the plea of *riens in arrear*, as being equivalent to the plea of *nil debet*, is not allowed (and see 3 Chit. Pl. 7th ed. 202). The plea is also objectionable as being ambiguous and embarrassing, for it does not show whether the defendant means to deny that the rent ever became due, or to assert that it has been satisfied by payment or otherwise. (See *post*, "*Replevin*," c. 6.) In this latter point of view its use would

Plea of Payment of the Rent when due (a).

That before action he satisfied and discharged the plaintiff's claim by payment.

Plea that the rent was satisfied by a distress: Aldridge v. *Howard*, 4 M. & G. 921. [*This plea must state that the rent was satisfied, as otherwise an action may be maintained, notwithstanding a distress taken: Lear* v. *Edmonds*, 1 B. & Ald. 157.]

Plea to part of the rent claimed, a deduction by the defendant for property tax paid in respect of the premises: Clennel v. *Read*, 7 Taunt. 50; *Franklin* v. *Carter*, 1 C. B. 750; *Taylor* v. *Evans*, 25 L. J. Ex. 269; 1 H. & N. 101; *Foley* v. *Fletcher*, 28 L. J. Ex. 100.

A like plea in respect of land tax, sewers' rates, etc.: Smith v. *Humble*, 15 C. B. 321 (b).

Pleas in actions for rent against executors and administrators, sued as assignees of the term: Ante, "*Executors and Administrators*," p. 497.

Plea that the Defendant kept the Premises in Tenantable Repair.

That he did at all times during the said tenancy keep the said messuage and premises in tenantable repair, order, and condition.

Plea that the Defendant used the Premises in a Tenantlike Manner.

That he did at all times during the said tenancy use the said messuage and premises in a tenantlike and proper manner.

Plea traversing the Want of Repair.

That the said house was not during the said term out of good or substantial repair as alleged [*traversing the breach as alleged in the declaration in terms*].

Plea that the defendant was always ready and willing to repair, but a reasonable time for doing the repairs had not elapsed before action: Green v. *Eales*, 2 Q. B. 225.

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be a violation of the r. 8, T. T. 1853, that "in every species of actions on contract, all matters in confession and avoidance shall be specially pleaded."

(a) This plea will be sufficient whether the rent was paid on the day when it became due, or afterwards in accord and satisfaction. A plea that the defendant was on the premises ready to pay the rent at the time it became due, but that plaintiff was not there ready to receive it, was held a bad plea. (*Haldane* v. *Johnson*, 8 Ex. 689.)

(b) A like plea might be pleaded of deduction in respect of payments for the interest of a mortgage of the premises (*Dyer* v. *Bowley*, 2 Bing. 94), or of payments of a rent-charge (*Taylor* v. *Zamira*, 6 Taunt. 524), or of rent to the ground landlord. (*Carter* v. *Carter*, 5 Bing. 406; *Sapsford* v. *Fletcher*, 4 T. R. 511.)

Plea that the Defendant did cultivate the Farm according to the Custom.

That he did during the said tenancy use and cultivate the said farm and land in a husbandlike manner according to the custom of the country where the same were situate. [*If the breaches are stated with particularity in the declaration, as in the form ante, p.* 176, *they should be traversed in terms.*]

Plea traversing the alleged Custom of the Country.

That he ought not, according to the course of good husbandry and the custom of the country where the said farm and lands were situate [to have had one-half of the arable land of the said farm in corn, and one-fourth part of the said arable land in seeds, and the remaining one-fourth part thereof in fallow or turnips] as alleged. [*The plea must be limited at the commencement to those breaches which are founded upon the parts of the custom traversed.*]

Like pleas: Hutton v. *Warren*, 1 M. & W. 466; *Hallifax* v. *Chambers*, 4 M. & W. 662; *Hartley* v. *Burkitt*, 4 Bing. N. C. 687.

Plea traversing the Breach of the Covenant for Title in a Lease.

That at the time of the making of the said demise the defendant had full and lawful power and authority to demise the said house to the plaintiff for the said term.

Plea traversing the Breach of the Covenant for Quiet Possession.

That the said *G. H.* did not enter into the said house or evict the plaintiff therefrom as alleged.

Plea traversing the Title of the Person evicting the Plaintiff.

That at the time when the said *G. H.* entered into the said house and evicted the plaintiff therefrom, the said *G. H.* had no lawful claim or title to the said house or to the possession thereof through or under the defendant as alleged.

Plea of a Surrender, to a Special Count for Rent or Breaches of Covenant (*a*).

That before the said rent became due [*or* before the alleged

(*a*) This defence need not be specially pleaded to a count for use and occupation, but may be shown under the general issue. (*Dodd* v. *Acklom*, 6 M. & G. 672; *Walls* v. *Atcheson*, 3 Bing. 462; and see *ante*, p. 535.)

By the Statute of Frauds, 29 Car. II. c. 3, s. 3, no leases or terms of years in any lands tenements or hereditaments shall be surrendered unless by deed or note in writing, signed by the party surrendering the same or his agent thereunto, lawfully authorized in writing or by act and operation of law. And by 8 & 9 Vict. c. 106, s. 3, a surrender in writing of any interest in any tenements or hereditaments (not being a copyhold interest, and not being an interest which might by law have been created without writing) shall be void at law unless made by deed.

As to what constitutes a surrender by operation of law, see *Phené* v. *Popplewell*, 31 L. J. C. P. 235, and the cases there cited.

breach, *or* before the breach herein pleaded to, *as the case may be*] he surrendered to the plaintiff the said demised premises and all the residue of the said term then to come and unexpired therein, and the plaintiff then accepted such surrender and took possession of the said premises.

Like pleas: Cannon v. *Hartley*, 19 L. J. C. P. 323; *Morrison* v. *Chadwick*, 7 C. B. 266.

Plea of a Surrender by Operation of Law.

That before the said rent became due [*or as in the last form*] the said demised premises and all the residue of the said term then to come and unexpired therein were duly surrendered by the defendant to the plaintiff by act and operation of law [that is to say, by the defendant then giving up to the plaintiff and the plaintiff then accepting from the defendant the possession of the said demised premises with the intention of then putting an end to the said term].

A like plea: Smith v. *Lovell*, 10 C. B. 6.

A special plea that the defendant gave up possession under an agreement to do so in consideration of being discharged from the rent: Gore v. *Wright*, 8 A. & E. 118; *Smith* v. *Lovell*, 10 C. B. 6.

A like plea of an agreement that the defendant should be discharged from all subsequent rent on delivering up possession to a third party, which he did: Turner v. *Hardy*, 9 M. & W. 770.

Plea that the tenancy or term was determined by a notice to quit before the rent became due or the breaches were committed: Jones v. *Shears*, 4 A. & E. 832; *Cadby* v. *Martinez*, 11 A. & E. 720.

Replication that the defendant afterwards waived the notice: Jones v. *Shears*, *supra*.

Plea of Eviction (*a*).

That during the said term and before the said rent became due [*or* before the alleged breach, *or* before the breach herein pleaded to] the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the said messuage and premises and evicted the defendant from the possession, use, and occupation thereof, and kept him so evicted thenceforth hitherto.

Plea of eviction from part of the demised premises: Morrison v.

(*a*) As to what amounts to eviction, see *Dunn* v. *Di Nuovo*, 8 M. & G. 105; *Upton* v. *Townend*, 25 L. J. C. P. 44; 17 C. B. 30; *Henderson* v. *Mears*, 28 L. J. Q. B. 305; *Furnivall* v. *Grove*, 8 C. B. N. S. 496; *Wheeler* v. *Severson*, 30 L. J. Ex. 46; 1 Wms. Saund. 204 (*f*). A voluntary giving up of possession upon a mere claim is no eviction, unless the claimant has a good title which he can enforce. (*Emery* v. *Barnett*, 27 L. J. C. P. 216; 4 C. B. N. S. 423.) The plea of eviction from part of the demised premises is a good defence to an action for rent; but not to actions on covenants or contracts, other than for the payment of rent. (*Morrison* v. *Chadwick*, 7 C. B. 266; *Newton* v. *Allin*, 1 Q. B. 518.) The plea cannot be supported by proof that the defendant was prevented from using an easement demised with the premises. (*Williams* v. *Hayward*, 28 L. J. Q. B. 374.) Eviction need not be specially pleaded to a count for use and occupation. (*Prentice* v. *Elliott*, 5 M. & W. 606; and see *ante*, p. 535.)

Chadwick, 7 C. B. 266; *Newton* v. *Allin*, 1 Q. B. 518; *Williams* v. *Hayward*, 28 L. J. Q. B. 374.

Plea that the defendant was prevented from entering on part of the demised premises, because it was occupied by another person: See Neale v. *Mackenzie*, 1 M. & W. 747; *Watson* v. *Ward*, 8 Ex. 335.

Plea of eviction by an action of ejectment and writ of possession at the suit of a third party: Davies v. *Underwood*, 27 L. J. Ex. 113; 2 H. & N. 570.

Plea of recovery of possession by the superior landlord upon a forfeiture incurred by the plaintiff: Franklin v. *Carter*, 1 C. B. 750.

Plea of re-entry by the plaintiff for a forfeiture: Oldershaw v. *Holt*, 12 A. & E. 592.

Plea of assignment of the reversion by the plaintiff and a claim of the rent by the assignee: Boodle v. *Cambell*, 7 M. & G. 386.

Plea of the insolvency of the plaintiff and notice by his assignees to pay the rent to them: Partington v. *Woodcock*, 6 A. & E. 690.

Plea that the premises became uninhabitable through default of the plaintiff, wherefore the defendant quitted possession: Arden v. *Pullen*, 10 M. & W. 321.

Plea to an action by an Assignee of the Lessor [or Lessee] traversing the Assignment to the Plaintiff (a).

That the said *G. H.* did not grant [*or* assign] to the plaintiff his reversion [*or* estate] of and in the said messuage and land as alleged.

Plea by an Assignee of a Lease [or Reversion] traversing the Assignment.

That the estate [*or* reversion] of the said *G. H.* of and in the said messuage and land did not vest in the defendant by assignment as alleged.

A special plea that the defendants are assignees of a bankrupt lessee, and have not elected to take the lease: Goodwin v. *Noble*, 27 L. J. Q. B. 204; 8 E. & B. 587.

Plea to an Action by the Assignee of the Reversion traversing that the Lessor was entitled to the Reversion (b).

That the said *G. H.* was not possessed [*or* seized] of the said reversion of and in the said demised premises as alleged.

(*a*) By the Statute of Frauds, 29 Car. II. c. 3, s. 3, no leases or terms of years in any lands, tenements, or hereditaments shall be assigned unless it be by deed or note in writing signed by the party assigning the same, or his agent thereunto lawfully authorized by writing, or by act or operation of law. And by the 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed.

An instrument, which was intended to be a lease and not an assignment, may be valid as a lease, although it passes all the lessor's interest, and will not be void for want of the requirements of an assignment under the above statutes. (*Pollock* v. *Stacy*, 9 Q. B. 1033.) An instrument intended to be an assignment, and void under the statutes, cannot operate as an underlease. (*Barrett* v. *Rolph*, 14 M. & W. 348.)

(*b*) A lessee is estopped from denying the lessor's title, as recited in the

Like pleas: Weld v. *Baxter*, 25 L. J. Ex. 214; 26 L. J. Ex. 112; 11 Ex. 816; 1 H. & N. 568; *Phelps* v. *Prew*, 3 E. & B. 430; *Cuthbertson* v. *Irving*, 28 L. J. Ex. 306.

Plea that the lessor was not possessed of the remainder of a term in the demised premises: Carvick v. *Blagrave*, 1 B. & B. 531; *Williams* v. *Hayward*, 28 L. J. Q. B. 374.

Plea, by the Lessee to an Action for Rent (on the reservation), that he assigned the Term and the Landlord accepted the Assignee as Tenant (*a*).

That before the said rent became due he assigned by deed all his said estate and term of years then to come and unexpired in the said demised premises to *J. K.*, who then entered into the same and was possessed thereof for the said residue of the said term, and the plaintiff then had notice thereof, and afterwards and before the said rent became due accepted from the said *J. K.* rent by the said demise reserved and made payable, and accepted the said *J. K.* as his tenant of the said demised premises.

A like plea: Dean of Windsor v. *Gover*, 2 Wms. Saund. 302.

Plea by the Assignee of a Lease that he had assigned the Term (*b*).

That before the said rent became due [*or* before the alleged breach, *or* before the breach herein pleaded to] he assigned by deed all his said estate and term of years then to come and unexpired in the said demised premises to *J. K.*, who then entered into the said demised premises and was possessed thereof for the said residue of the said term.

Plea that the Lessor assigned the Reversion before Breach (*c*).

That before the said rent became due [*or* before the alleged

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lease. If the title is not shown in the lease, the lessee is estopped from pleading that the lessor *nil habuit in tenementis*, or any defence involving that assertion. In such case the lessor has a reversion by estoppel, which is *primâ facie* evidence of a reversion in fee simple, and will sustain an averment of such estate. (*Cuthbertson* v. *Irving*, 28 L. J. Ex. 306; 4 H. & N. 742.) The lessee may rebut the *primâ facie* presumption of the reversion being in fee simple by evidence consistent with the estoppel, as by showing that the reversion is an estate for years or for life; but not by showing that the lessor had no estate at all, for this would be inconsistent with the estoppel. (*Weld* v. *Baxter*, 26 L. J. Ex. 112; 1 H. & N. 568.) See further as to reversions by estoppel, *ante*, p. 179, n.

(*a*) If the lessee assign over his term, and the lessor accept the assignee as his tenant, the lessor cannot have an action of debt for the rent against the first lessee; although he may sue on the covenant, if any, to pay the rent. (1 Wms. Saund. 240*a*, 2 Wms. Saund. 302 n. (5); *Wadham* v. *Marlowe*, 8 East, 314; notes to *Spencer's case*, 1 Smith's L. C. 5th ed. 43; see *ante*, p. 172.) Hence the above plea will be no defence to an action on an express covenant by the lessee to pay the rent.

(*b*) The assignee of a term is liable for breaches of covenant happening whilst he continues assignee, but not for those committed after an assignment by him. (*Harley* v. *King*, 2 C. M. & R. 18; *Taylor* v. *Shum*, 1 B. & P. 21; *Paul* v. *Nurse*, 8 B. & C. 486; and see the notes to *Spencer's case*, 1 Smith's L. C. 5th ed. p. 43.)

(*c*) This plea is no defence to a contract contained in a lease not under

breach, *or* before the breach herein pleaded to] the plaintiff by deed granted and assigned all his reversion of and in the said demised premises to *J. K.*, and thenceforth ceased to have any reversion therein.

Like pleas: Green v. *James*, 6 M. & W. 656; *Pargeter* v. *Harris*, 7 Q. B. 708; *Bickford* v. *Parson*, 5 C. B. 920.

LEAVE AND LICENSE. See *post*, "*Rescission of Contract*," p. 568.

LIMITATION, STATUTES OF (*a*).

seal, because such contracts do not pass by assignment of the reversion under the statute 32 Hen. VIII. c. 34. (*Bickford* v. *Parson*, 5 C. B. 920; and see *ante*, p. 178 (*a*).) The defence could not be pleaded to a count for breaches of covenant committed before the assignment. (*Ib.*) It is no defence to an action on covenants which are not of a nature to run with the land, as such covenants do not pass by the assignment. (*Webb* v. *Russel*, 3 T. R. 393.)

(*a*) *Limitation of actions on contracts.*]—The Statutes of Limitation form a defence to an action after the prescribed period has run, and must be specially pleaded.

The principal enactments respecting the limitation of actions upon contracts are the following:

By the 21 Jac. I. c. 16, s. 3, actions on contracts not under seal must be commenced within six years next after the cause of action, and not after. An exception was made in the statute in respect of merchants' accounts (see *Inglis* v. *Haigh*, 8 M. & W. 769); but this has been recently repealed by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 9.

By the 3 & 4 Will. IV. c. 42, s. 3, actions upon contracts under seal or any specialty must be brought within twenty years next after the cause of action and not after. Actions for debt on a statute (other than penal actions) are considered as founded on a specialty within this enactment; as actions for calls under the Companies Clauses Consolidation Act, 1845. (*Cork and Bandon Ry. Co.* v. *Goode*, 13 C. B. 826; and see *Shepherd* v. *Hills*, 25 L. J. Ex. 6.)

By the statute 3 & 4 Will. IV. c. 42, s. 3, actions for penalties given by a statute to the *party grieved* must be brought within two years after the cause of action accrued.

By 31 Eliz. c. 5, s. 5, actions or penalties given to a common informer must be brought within *one* year.

By the 22 & 23 Vict. c. 49, ss. 1, 4, it seems to be provided that actions for debts incurred by guardians of any union or parish, or the board of management of any school or asylum district, must be commenced within three months after the expiration of the half-year in which the debts were incurred, unless the Poor Law Board, by order, extend the time for a period not exceeding twelve months from the date of the debts. (See *Waddington* v. *Guardians of Poor of City of London Union*, 28 L. J. M. C. 113.)

By the effect of s. 7 of the above statute of Jac. I., and s. 4 of that of Will. IV., if the person entitled to any action within those statutes is at the time of the cause of action accrued within the age of twenty-one years, feme covert, or *non compos mentis*, the time does not begin to run till those dis-

abilities have ceased. A similar privilege was also extended to plaintiffs imprisoned or beyond seas, but has been abolished by 19 & 20 Vict. c. 97, s. 10. Also by the 4 Anne, c. 16, s. 19, if the person against whom the cause of action exists is at the time of the accruing of the cause of action beyond the seas, the person entitled to the cause of action may bring the action against such person after his return from beyond the seas within the time limited by the statute of James. The 4th section of the 3 & 4 Will. IV. c. 42, contains a similar provision with respect to actions on specialties against persons beyond the seas. As to what is beyond the seas within the meaning of the above statutes, see 3 & 4 Will. IV. c. 42, s. 7; and 19 & 20 Vict. c. 97, s. 12.

The time of limitation begins to run from the period when the action might first have been brought, subject to the above provisions. Where the time has once begun to run, no subsequent disability will suspend the operation of the statutes. (*Rhodes* v. *Smethurst*, 6 M. & W. 351; *Homfray* v. *Scroope*, 13 Q. B. 509, 512.) If the plaintiff relies upon any of the above disabilities as deferring the period of limitation, he must reply the fact specially. (*Chandler* v. *Vilett*, 2 Wms. Saund. 118.)

It is no answer to a plea of the statute that the cause of action was fraudulently concealed from the plaintiff until within six years before the suit; and a replication to that effect is bad, whether pleaded on legal or on equitable grounds. (*Clark* v. *Hougham*, 2 B. & C. 149; *Hunter* v. *Gibbons*, 26 L. J. Ex. 1; 1 H. & N. 459; *Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39; and see *ante*, p. 486.)

Under the issue raised by a plea of the statute, the commencement of the action is the date of the issuing of the original writ of summons. (C. L. P. Act, 1852, s. 2.) Writs of summons may be renewed to prevent the operation of the statute. (C. L. P. Act, 1852, s. 11; and see 2 Chit. Pr. 11th ed. p. 1293.) The date of the cause of action is the date of the breach of contract or other injurious act, and not of the accruing of the damages resulting therefrom. (2 Wms. Saund. 63 *e*, n. (*m*).) In the case of a bond or covenant to do various things, the statute begins to run from the date of each breach in respect of that breach, but every new breach gives a new cause of action. (*Sanders* v. *Coward*, 15 M. & W. 48.)

By the statutes 21 Jac. I. c. 16, s. 4, and 3 & 4 Will. IV. c. 42, s. 6, after a judgment for the plaintiff is reversed in error, or judgment arrested after verdict for the plaintiff, the plaintiff may commence a new action within a year.

See further as to Statutes of Limitation, *post*, "*Limitation*," ch. 6.

Renewal of Debt by acknowledgment.]—The effect of the Statutes of Limitation may in cases of debt be avoided by a subsequent acknowledgment of the debt remaining due.

With respect to *simple-contract debts*: If at any time after a debt is due, the debtor renews his promise to pay it, or makes such an unqualified acknowledgment of the debt being due that a promise to pay it may be inferred therefrom, he renews his liability from the date of such promise or acknowledgment, and cannot avail himself of the Statutes of Limitations in respect of the preceding lapse of time. (*Tanner* v. *Smart*, 6 B. & C. 603; *Linsell* v. *Bonsor*, 2 Bing. N. C. 241; *Sidwell* v. *Mason*, 26 L. J. Ex. 407.) The debtor may by such subsequent promise renew his liability absolutely or to a limited extent. He may promise to pay a portion of the debt, or to pay it by instalments, or to pay it at some future day, or conditionally upon the happening of some event: in such cases his liability is limited by the terms of his new promise. (*Tanner* v. *Smart*, *supra*; *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Humphreys* v. *Jones*, 14 M. & W. 1; and see *ante*, "*Limitation*," p. 188.) Part payment on account of the debt is in general a sufficient acknowledgment from which a renewed promise to pay the residue may be inferred. (*Cottam* v. *Partridge*, 4 M. & G. 287; *Bodger* v. *Arch*,

24 L. J. Ex. 19; *Wainman* v. *Kynman*, 1 Ex. 121; *Davies* v. *Edwards*, 7 Ex. 22.) And payment of interest on account of the debt has the same effect as part payment of the debt itself. (*Bamfield* v. *Tupper*, 7 Ex. 27; *Sims* v. *Brutton*, 5 Ex. 809.)

The acknowledgment must be made to the creditor otherwise a promise cannot be inferred. (*Godwin* v. *Cutley*, 4 H. & N. 373, 380.) An acknowledgment made to a *cestui que* trust of the debt, would enure to the benefit of the trustee as the nominal plaintiff. (*Mountstephen* v. *Brooke*, 3 B. & Ald. 141; see *Parmiter* v. *Parmiter*, 30 L. J. C. 508.) An infant may renew a debt for necessaries by acknowledgment. (*Willins* v. *Smith*, 4 E. & B. 180.)

The renewal of liability by acknowledgment is confined to cases of debts acknowledged; no similar effect is given to acknowledgments of liability for other breaches of contract not resulting in debts. (*Boydell* v. *Drummond*, 2 Camp. 157, 160.)

Before Lord Tenterden's Act (9 Geo. IV. c. 14) the acknowledgment might be proved either by writing or verbally. By that Act, s. 1, it is enacted "that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statutes of Limitation, unless such acknowledgment or promise shall be made in some writing to be signed by the party chargeable thereby." (See *Haydon* v. *Williams*, 7 Bing. 163, 166.) And by s. 8, "no writing made necessary by this Act shall be deemed to be an agreement within any statute relating to stamps."

By the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 13, it is enacted in reference to the above sections that "an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

Lord Tenterden's Act, s. 1, expressly provided that nothing therein contained should alter or take away or lessen the effect of any payment of any principal or interest; and therefore an acknowledgment so made may still be proved by verbal evidence. (*Cleave* v. *Jones*, 6 Ex. 573.)

By s. 3 of Lord Tenterden's Act it is enacted "That no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute."

The renewed promise when absolute revives the cause of action from the time of such promise being made, and is considered as a new cause of action; so that upon the Statute of Limitations being pleaded, the replication taking issue in substance asserts that the cause of action did accrue within the prescribed period. (*Tanner* v. *Smart*, 6 B. & C. 603, 606; *Ridd* v. *Moggridge*, 2 H. & N. 567.)

In cases of *specialty-debts* the effect of the Statutes of Limitations may be avoided by subsequent acknowledgments in the manner provided by the 3 & 4 Will. IV. c. 42. By s. 5 of that statute, it is enacted that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid. And the plaintiff or plaintiffs in any such action may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute. As the ac-

Plea of the Statute of Limitations (*C. L. P. Act*, 1852, *Sched. B.* 39.)

That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit.

Replication in an Action on a Specialty of an Acknowledgment within Twenty Years (3 & 4 *Will. IV. c.* 42, *s.* 5) (*a*).

That the defendant within twenty years before this suit made an acknowledgment [in writing signed by him *or* his agent, *or* by part payment *or* by part satisfaction, *as the case may be*, on account of the principal money *or* interest then due on the said deed *or* bond, *or as the case may be*] that the debt in the declaration mentioned remained unpaid and due to the plaintiff.

A like replication: Forsyth v. *Bristowe*, 3 Ex. 348.

Replication that the Defendant was Abroad when the Cause of Action accrued (4 *Anne, c.* 16, *s.* 19) (*b*).

That when the alleged cause of action accrued the defendant was in [Australia], beyond the seas within the meaning of the statute in

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knowledgment under this section may be made in writing not under seal, it is the original cause of action founded on the deed or specialty which is revived from that date; and it is not the mere acknowledgment which forms a new cause of action, as in the case of simple-contract debts. The acknowledgment need not be such as necessarily to import a promise to pay (*Moodie* v. *Bannister*, 28 L. J. C. 881); and therefore, it seems, may be sufficient, if made to a stranger and not to the creditor. (*Howcutt* v. *Bonser*, 3 Ex. 491, 500.) The acknowledgment under this section must be replied specially, and cannot be given in evidence under a joinder of issue or a replication that the cause of action accrued within twenty years before this suit. (*Kempe* v. *Gibbon*, 9 Q. B. 609.) The mode of making the acknowledgment, whether by writing or by part payment or by part satisfaction, must also be specifically stated in the replication. (*Forsyth* v. *Bristowe*, 8 Ex. 347.) A renewal of liability under this statute applies only to money remaining unpaid and acknowledged to be due, and not to other acts and omissions in breach of covenants. (*Blair* v. *Ormond*, 17 Q. B. 423.)

With respect to acknowledgment and payment by one of several joint-debtors: the 9 Geo. IV. c. 14, s. 1, provided that an acknowledgment of the debt by one of several joint debtors should not revive the remedy against the others. This enactment did not extend to acknowledgment by part payment or payment of interest (*Wyatt* v. *Hodson*, 8 Bing. 309); but by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 14, it was enacted in reference to the provisions of the Acts 21 Jac. I. c. 16, s. 3, and 3 & 4 Will. IV. c. 42, s. 3, "that no co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators."

(*a*) The replication in actions on simple contracts may take issue on the plea, and under this the plaintiff may show that the cause of action was renewed within six years. (See *ante*, p. 544.)

(*b*) In the case of joint debtors the statute runs as to such as are not beyond the seas, but does not run as to such as are beyond the seas, and a judgment recovered against the former is no bar to an action against the latter after their return. (19 & 20 Vict. c. 97, s. 11.)

The replication, which was formerly available, that the plaintiff was

that case made and provided; and the plaintiff commenced this suit within six years next after the first return of the defendant from beyond the seas after the accruing of the alleged cause of action.

Like pleas: Fannin v. *Anderson*, 7 Q. B. 811; *Lane* v. *Bennett*, 1 M. & W. 70.

Replication of the infancy of the plaintiff at the time of the accruing of the cause of action: Chandler v. *Vilett*, 2 Wms. Saund. 118.

Replication of the insanity of the plaintiff at the time of the accruing of the cause of action: Tarbuck v. *Bispham*, 2 M. & W. 2.

Replication, by an administrator, to a plea of the Statute of Limitations, that the testator commenced an action within six years, which abated by his death, and that the plaintiff sued within a reasonable time after the death: Waters v. *Earl of Thanet*, 2 Q. B. 757 (*a*).

Replication, to a plea of the Statute of Limitations by an administrator, that the plaintiff brought an action within six years against the deceased, which abated by his death, and that the present action was commenced within a reasonable time after the grant of administration: Curlewis v. *Mornington*, 7 E. & B. 283; 26 L. J. Q. B. 181; 27 L. J. Q. B. 439.

A like replication, in an action on a bond, to a plea by an administrator under the statute 3 & 4 *Will. IV. c.* 42, *s.* 3: *Sturgis* v. *Darrell*, 28 L. J. Ex. 366; 29 L. J. Ex. 472; 4 H. & N. 622; 6 H. & N. 120.

Replication of the Statute of Limitations to a plea of set-off: see post, "Set-off," p. 583.)

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abroad when the cause of action accrued and that he sued within six years after his return (*Towns* v. *Mead*, 16 C. B. 123); has been done away with by 19 & 20 Vict. c. 97, s. 10; so also the replication that the plaintiff was in prison when the cause of action accrued. (*Ib.*) But these provisions of the statute are not retrospective. (*Jackson* v. *Woolley*, 27 L. J. Q. B. 448.)

(*a*) Formerly, when an action commenced within the period of limitation abated by the death of the plaintiff, his representative might commence a new action within a reasonable time after the death, notwithstanding the period of limitation had then expired (2 Wms. Saund. 64 *a*); and where a similar action abated by the death of the defendant, the plaintiff might bring a new action within a reasonable time after the appointment of a representative (*Curlewis* v. *Mornington*, 26 L. J. Q. B. 181; 7 E. & B. 283; S. C. in error, 27 L. J. Q. B. 439); whether the debt was a simple contract debt within the statute 21 Jac. I. c. 16, or a specialty debt within the statute 3 & 4 Will. IV. c. 42 (*Sturgis* v. *Darrell*, 28 L. J. Ex. 366). But the C. L. P. Act, 1852, s. 135, enacting that the death of a plaintiff or defendant shall not cause the action to abate, but that it may be continued as therein mentioned, renders this mode of proceeding unnecessary in respect of actions in which the death of a party has occurred since the passing of that statute. Where the debtor dies abroad, and no probate or administration is taken out in England, the statute does not run. (*Flood* v. *Patterson*, 30 L. J. C. 486.)

Lunacy.

See "*Insanity*," *ante*, p. 517.

Maintenance (*a*).

Plea, to an action for work as an attorney that it was performed in carrying out an illegal agreement between the defendant and other persons to maintain one another in defending a claim against them: *Findon* v. *Parker*, 11 M. & W. 675.

Plea, to an action on an agreement to supply the defendant with evidence to prove his title to property, that the agreement was in respect of impending litigation, and in consideration of receiving a portion of the property recovered, and amounted to maintenance: *Sprye* v. *Porter*, 26 L. J. Q. B. 64; 7 E. & B. 58.

Demurrer to a count on the same ground: *Stanley* v. *Jones*, 7 Bing. 369; *Earle* v. *Hopwood*, 30 L. J. C. P. 217; 9 C. B. N. S. 566.

Marriage.

See "*Abatement*," *ante*, p. 408; "*Husband and Wife*," *ante*, p. 510.

General Issue (*b*).

"Non assumpsit," *ante*, p. 401.

(*a*) The purchase by the attorney in the suit of the whole or part of the property to be recovered in the action, *pendente lite*, is illegal and void. (*Simpson* v. *Lamb*, 7 E. & B. 84; 26 L. J. Q. B. 121.) So, a contract to pay the attorney in the suit, over and above all legal charges, a sum of money according to the interest and benefit of the litigant sought to be recovered in the action, is void as amounting in effect to the same thing. (*Earle* v. *Hopwood*, 9 C. B. N. S. 566; 30 L. J. C. P. 217.) But the taking by the attorney of a security upon the property to be recovered in the action for past advances made towards prosecution of the suit is not illegal. (*Anderson* v. *Radcliffe*, 28 L. J. Q. B. 32; 29 L. J. Q. B. 128.)

(*b*) In an action for breach of a promise to marry, the plea of the general issue (*non assumpsit*) denies the contract, that is, the mutual promises to marry. All conditions precedent, as the plaintiff's continuing ready and willing, notice to the defendant or a request where necessary to support the action, that a reasonable time or the day appointed had elapsed before action, if denied, must be traversed specifically.

A plea of a pre-contract with another is a bad plea. (*Beechy* v. *Brown*, 29 L. J. Q. B. 105; E. B. & E. 796; and see *ante*, p. 160, n. (*a*).) A plea that after the promise the defendant discovered that the plaintiff had been insane and confined in a lunatic asylum is bad. (*Baker* v. *Cartwright*, 30 L. J. C. P. 364.)

A plea that after the promise the defendant was afflicted with a disease, by reason whereof he became incapable of marriage without danger to his life, was held a bad plea. (*Hall* v. *Wright*, 27 L. J. Q. B. 345; 29 L. J. Q. B. 43; E. B. & E. 746.)

Plea that the Time for the Marriage had not elapsed.

That a reasonable time [*or* the said day agreed on] for the said marriage had not elapsed before action as alleged.

Plea that the plaintiff and defendant mutually rescinded the contract: *Short* v. *Stone*, 8 Q. B. 358; *Hall* v. *Wright*, 27 L. J. Q. B. 345; *and see the plea of rescission of contract, post*, p. 568.

Plea that before breach the plaintiff exonerated and discharged the defendant from his promise: *King* v. *Gillett*, 7 M. & W. 55; *Davis* v. *Bomford*, 30 L. J. Ex. 139 (*a*).

Plea that after making the Promise the Defendant discovered that the Plaintiff was not chaste.

That the defendant made the alleged promise on the faith and under the belief that the plaintiff had always been and then was a chaste and modest woman; whereas the plaintiff had not always been nor was she then a chaste or modest woman, which the defendant first discovered after making the alleged promise and before the alleged breach, wherefore the defendant then refused to marry the plaintiff, which is the alleged breach.

Like pleas: *Young* v. *Murphy*, 3 Bing. N. C. 54; *Bench* v. *Merrick*, 1 C. & K. 463; *and see as to this defence, Irving* v. *Greenwood*, 1 C. & P. 350.

Plea that after making the promise the defendant discovered that the plaintiff was of intemperate habits: *Harbert* v. *Edgington*, 1 C. & K. 434, n. (*a*).

Master and Servant,

General Issue (*b*).

"Never indebted," *ante*, p. 397; "Non assumpsit," *ante*, p. 401.

(*a*) This plea was held good in form, but in order to prove it the defendant must show a rescission of the contract or what is equivalent. (*King* v. *Gillett*, 7 M. & W. 55; and see *post*, p. 570.) A total cessation of correspondence and intercourse between the parties is evidence in support of the plea. (*Davis* v. *Bomford*, 30 L. J. Ex. 139.)

(*b*) The general issue never indebted to the indebitatus count for wages puts in issue the hiring or contract and the services rendered under it. Under this issue the defendant may show that the service was under a special contract, which was rescinded upon the misconduct of the plaintiff before any wages had become due under it. (*Lilley* v. *Elwin*, 11 Q. B. 742.)

The general issue *non assumpsit* pleaded to a special count puts in issue the contract alleged, and under it the defendant may show any exceptions or qualifications of the contract stated, as that it was determinable by notice. (*Metzner* v. *Bolton*, 9 Ex. 518; *Williams* v. *Byrne*, 7 A. & E. 177; *Lilley* v. *Elwin*, 11 Q. B. 742; and see *ante*, p. 402.) The defendant must traverse the fact of dismissal, if intended to be denied; and must plead specially that due notice was given before dismissal (*Williams* v. *Byrne*, 7

Plea traversing the Dismissal (a).

That the defendant did not dismiss the plaintiff from the said service as alleged.

Plea, to a Count for wrongful Dismissal, that the Service was determined by due Notice (b).

That [one calendar month] before the defendant dismissed the plaintiff from the said service as alleged, the defendant gave to the plaintiff [*or* the plaintiff gave to the defendant] [one calendar month's] notice of his intention to put an end to the said service.

Plea that by the custom of the trade the service might be put an end to by a month's notice, and notice was given accordingly: Parker v. *Ibbetson*, 27 L. J. C. P. 236; 4 C. B. N. S. 346.

Replication that the Notice was waived.

That after the giving of the said notice and before the expiration thereof, and before the defendant dismissed the plaintiff as alleged, the plaintiff and the defendant agreed that the said notice should be withdrawn by the plaintiff [*or* defendant] and waived by the plaintiff and the defendant respectively, and that the said service should not determine according to the said notice but should continue as if no such notice had been given, and thereupon the said notice was then so withdrawn and waived accordingly.

Plea justifying a Dismissal on the Ground of Incompetency.

That he was induced to make the alleged contract by the plaintiff representing and warranting to him that he, the plaintiff, was then reasonably competent to perform the said service for which he was so engaged as aforesaid; whereas the plaintiff was not then nor has he since been reasonably competent to perform the said service; wherefore the defendant rescinded the said contract, and dismissed the plaintiff from his said service, which is the alleged breach.

A like plea: Harmer v. *Cornelius*, 28 L. J. C. P. 85; 5 C. B. N. S. 236.

A. & E. 177; *Wilkinson* v. *Gaston*, 3 Q. B. 137), and all matters in excuse and justification, as the misconduct of the plaintiff. (*Speck* v. *Phillips*, 5 M. & W. 279.)

(*a*) In *Powell* v. *Bradbury*, 7 C. B. 201, it was held that a traverse that the defendant "wrongfully and without reasonable or probable cause" dismissed the plaintiff did not put in issue the wrongfulness or want of reasonable or probable cause, but merely the fact of dismissal. But in *Lush* v. *Russell*, 5 Ex. 203, where a similar plea was pleaded (in the form of a special traverse) it was held that although the plea was objectionable as traversing an immaterial allegation in the declaration, yet as issue had been joined upon it, it put in issue the wrongfulness and want of reasonable and probable cause as well as the dismissal; but that the proof of the plaintiff's misconduct lay upon the defendant. So, under a plea that the plaintiff did not faithfully serve according to the agreement, upon which issue was joined, evidence of misconduct amounting to a justification of the dismissal was admitted, the plea being treated as an informal plea of justification. (*Horton* v. *M'Murtry*, 5 H. & N. 667; 29 L. J. Ex. 260.)

(*b*) As to the construction of contracts of service with regard to the notice to determine them, see *ante*, "*Master and Servant*," p. 192.

Plea justifying a Dismissal on the Ground of Misconduct (*a*).

That after the said contract, and before the alleged breach, the plaintiff misconducted himself in the said service by wilfully disobeying the reasonable orders of the defendant by him given to the plaintiff in the said service [*or* by habitually neglecting his duties in the said service and failing to perform the same, *or* by dishonestly converting to his own use money which he had received to the use of the defendant, *state thus the cause or causes of dismissal, according to the fact*], wherefore the defendant then discharged the plaintiff from the said service, which is the alleged breach.

Pleas of Misconduct.

Plea of the improper, disobedient, and insolent conduct of the plaintiff as a clerk: Amor v. *Fearon*, 9 A. & E. 548.

Plea that the plaintiff, an accountant, received money for which he did not account, and made improper payments and false entries: Baillie v. *Kell*, 4 Bing. N. C. 638.

Plea of the misconduct of the plaintiff as an attorney's clerk: Mercer v. *Whall*, 5 Q. B. 447.

Plea of want of skill and disobedience of the plaintiff in his employment as manager of a cotton factory: Cussons v. *Skinner*, 11 M. & W. 161.

Plea of disobedience and misappropriation of money by the plaintiff as a traveller and salesman: Spotswood v. *Barrow*, 5 Ex. 110.

Plea that the plaintiff, a governess, was an immoral and dishonest person, and unfit for the situation: Burgess v. *Beaumont*, 7 M. & G. 962.

Plea that the plaintiff, a domestic servant, absented herself all night contrary to orders: Turner v. *Mason*, 14 M. & W. 112.

Plea, to a count for wages, that the plaintiff was hired as a servant on the terms that he should forfeit his wages if he got drunk, and that he did get drunk: Monkman v. *Shepherdson*, 11 A. & E. 411.

(*a*) The master is justified in dismissing his servant if the latter has been in fact guilty of misconduct, although that was not the actual motive which induced the master to dismiss him (*Ridgway* v. *Hungerford Market Co.*, 3 A. & E. 171; and see *Oakes* v. *Wood*, 2 M. & W. 791); and notwithstanding the master did not know of the misconduct at the time of dismissal (*Cussons* v. *Skinner*, 11 M. & W. 161; *Spotswood* v. *Barrow*, 5 Ex. 110); but it seems that when the plea embodies the master's knowledge with the cause of dismissal, it becomes a part of the description of the offence and must be proved. (*Mercer* v. *Whall*, 5 Q. B. 446, 447.) The plea must formerly have stated the misconduct with sufficient particularity to enable the plaintiff to meet the charge. (*Burgess* v. *Beaumont*, 7 M. & G. 962.) And it seems that particularity would still be required, if objection is made to the plea for want of it. (See *Horton* v. *M'Murtry*, 5 H. & N. 667; 29 L. J. Ex. 260.) As to what misconduct will justify a dismissal, see Chit. Contr. 6th ed. p. 509.

Plea to a special count for wages, that the plaintiff was not ready and willing to perform, and did not perform, the services agreed upon during the period for which he seeks to recover the wages, held a good defence as avoiding circuity of action: Cuckson v. *Stones*, 28 L. J. Q. B. 25; 1 E. & E. 248.

Medical Attendance.

General Issue (*a*).

"Never Indebted," *ante*, p. 397.

Merger (*b*).

Plea to a Count for a simple Contract Debt, of Merger by the Defendant covenanting to pay the Debt.

That after the accruing of the plaintiff's claim it was merged and extinguished by the defendant executing and delivering to the

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(*a*) Under this issue the plaintiff must prove that he is duly registered under "the Medical Act." (See *ante*, p. 196.)

(*b*) Where a security of a higher nature is taken or obtained for a debt, the original remedies for the debt are merged in the higher security. Thus, if a bond or covenant is given for a simple contract debt, the simple contract is merged in the higher security; and so, if judgment be recovered in an action for a simple contract or bond or specialty debt, the original security is merged in the judgment, which, being matter of record, is of a higher nature. (*Higgen's Case*, 4 Co. 45, *b*; *Drake* v. *Mitchell*, 3 East, 251, 259.) Where a higher security is given for the identical debt due under the inferior security, the merger of the debt takes place by operation of law independently of the intention of the parties; but where the debts are not identical, or the parties are not the same, there is no merger, and the second security does not discharge the first, unless given and accepted in satisfaction and discharge, which is a different ground of answer. (*Price* v. *Moulton*, 10 C. B. 561.)

Where the defendant, being indebted to the plaintiff, gave a bond with sureties to a limited amount, to secure the present debt and future advances, it was held that the bond was only a collateral security, and did not merge the debt. (*Norfolk Ry. Co.* v. *M'Namara*, 3 Ex. 628.) So where a banker took a bond from his customer and a surety conditioned for the payment of all moneys advanced or to be advanced, it was held that the actual debt, not being in existence at the time of giving the bond, was not thereby merged. (*Holmes* v. *Bell*, 3 M. & G. 213.) If one of two makers of a joint and several promissory note gives the holder a deed of mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged, because the remedy given by the specialty security, being confined to one of the debtors only, is not co-extensive with the remedy on the note. (*Ansell* v. *Baker*, 15 Q. B. 20.)

Where securities for a debt are collateral, the merger of such a security does not affect the debt; as where a bill of exchange was given as security for a debt due under a covenant, a judgment recovered on the bill without

plaintiff, and the plaintiff accepting and receiving from him, a certain deed, whereby the defendant covenanted with the plaintiff to pay the plaintiff the debt in the declaration mentioned.

A like plea: Price v. *Moulton*, 10 C. B. 561.

Mistake.

See "*Equitable Pleas*," *ante*, p. 487.

Mortgage.

General Issue (*a*).

"Non est factum," *ante*, p. 403.

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satisfaction was held to be no answer to an action on the covenant. (*Drake* v. *Mitchell*, 3 East, 251.)

The defence of merger must be specially pleaded. (*Weston* v. *Foster*, 2 Bing. N. C. 693; *Filmer* v. *Burnby*, 2 M. & G. 529; *ante*, pp. 398, 402.) Merger by execution and delivery of a deed of covenant may be pleaded to part of an indebitatus count, and if the plaintiff relies on the whole amount claimed being an entire indivisible debt, he must reply to that effect. (*Price* v. *Moulton*, 10 C. B. 561; but see as to the merger of part of a debt, *Ib.* 570.) A replication to a plea of merger, that the deed was executed by way of security for the debt, and was expressed so to be, was held bad. (*Price* v. *Moulton*, *supra*.)

As to merger by judgment recovered for the same debt, see *ante*, "*Judgment Recovered*," p. 531.

(*a*) The general issue *non est factum* operates as a denial of the execution of the deed in point of fact only, and all other defences must be specially pleaded. See r. 10, 11, 12, T. T. 1853, cited *ante*, "*Bond*," p. 466; and see the effect of the general issue, *ante*, p. 403.

The Court has a summary jurisdiction to stay proceedings under the statute 7 Geo. II. c. 20. By s. 1 it is enacted that where any action shall be brought on any bond for payment of the money secured by a mortgage, or performance of the covenants therein contained, and no suit shall be then pending for foreclosure or redemption, if the defendant shall pay the mortgagee, or bring into court the principal and interest and costs (to be computed by the court), the money so paid or brought into court shall be deemed to be in full satisfaction and discharge of such mortgage, and the court shall discharge the defendant from the same, and shall compel the mortgagee to reconvey the mortgaged lands and deliver up the deeds relating to the title. An action of covenant on a mortgage deed is within the above statute. (*Smeeton* v. *Collier*, 1 Ex. 457.)

The above section also gave the court a summary jurisdiction to stay proceedings in actions of ejectment by a mortgagee, and to compel a reconveyance on payment of the principal, interest, and costs. A similar provision with reference to the present action of ejectment is contained in the C. L. P. Act, 1852, s. 219.

NEW ASSIGNMENT (*a*).

New Assignment of another Debt than that pleaded to in an Indebitatus Count.

[*Commence with one of the forms, ante, p.* 393, *as the case requires.*]

(*a*) In consequence of the generality of statement admitted in declarations a plea sometimes mistakes altogether the cause of action, and sometimes restricts it within narrower limits than the plaintiff intended. In such cases the plaintiff cannot safely reply to the plea, for by so doing he adopts the particular or restricted cause of action which the plea specifies. (*Rogers* v. *Custance*, 1 Q. B. 77; *Bracegirdle* v. *Peacock*, 8 Q. B. 177; *Jacob* v. *Ellis*, 3 D. & L. 364.) And he is not allowed by way of replication merely to deny that the cause of action specified by the plea is the cause of action in the declaration; for under the issue offered by such a replication the only question would be one of identity, and the defendant would have been precluded from answering the causes of action on which the plaintiff really relies. (*Wheeler* v. *Senior*, 7 M. & W. 562; *Glover* v. *Dixon*, 9 Ex. 159.)

The proper course is for the plaintiff to new assign or restate his cause of action, and the defendant then has an opportunity of pleading to the newly assigned cause of action in the same manner as to an original declaration. The nature of a new assignment shows that it is never required or applicable after a plea in denial.

Where the plea answers the declaration generally without particularizing or restricting the general statement of the cause of action to which it is pleaded, as a general plea of payment to an indebitatus count (*Dite* v. *Hawker*, 1 D. & L. 189; *Freeman* v. *Crafts*, 4 M. & W. 4; *James* v. *Lingham*, 5 Bing. N. C. 553), or a plea in abatement of the non-joinder of co-contractors pleaded to an indebitatus count (*Hill* v. *White*, 6 Bing. N. C. 26), or a plea of leave and license to a count for a trespass (*Barnes* v. *Hunt*, 11 East, 451), a new assignment is unnecessary, for the defendant by such a plea undertakes to show that his defence is applicable to whatever the plaintiff can prove under the declaration. (*Ib.*; *Moses* v. *Levy*, 4 Q. B. 213; *Burgess* v. *De Lane*, 27 L. J. Ex. 154.) Where the plea is pleaded to part only of the declaration specifying the part pleaded to (*Bush* v. *Parker*, 1 Bing. N. C. 72), or specifically excepting the part not pleaded to (*Neville* v. *Cooper*, 2 C. & M. 329), it is not necessary to new assign the part of the cause of action not pleaded to, for this part must be met by other pleas, otherwise the plaintiff will be entitled to judgment upon it.

A new assignment states that the plaintiff proceeds for another cause of action than that admitted in the plea; as, for example, for another promise or debt (*Hall* v. *Middleton*, 4 A. & E. 107; *Monkman* v. *Shepherdson*, 11 A. & E. 411), for a trespass on a different spot or upon a different occasion (*Pratt* v. *Groome*, 15 East, 235; *Oakley* v. *Davis*, 16 East, 82), or for an excess in committing an act which the defendant attempts to justify by the plea. (*Worth* v. *Terrington*, 13 M. & W. 781; *Playfair* v. *Musgrove*, 14 M. & W. 239.) The averment that the cause of action newly assigned is other than that admitted in the plea is a material averment which is put in issue by the general issue or other appropriate traverse of the new assignment.

The plaintiff under a new assignment is also bound to state and prove a cause of action within the terms of the declaration; for to travel out of or amplify the declaration would be a departure. (*Cheasley* v. *Barnes*, 10 East, 80; *Price* v. *Great Western Ry. Co.*, 31 L. J. Q. B. 101.) And by the C. L. P. Act, 1852, s. 87, *post*, p. 555, the new assignment must be consistent with and confined by the particulars delivered in the action, if any.

Money payable by the defendant to the plaintiff for other causes of action than those in the said plea referred to.

New Assignment of the Breach of another Promise or Agreement than that pleaded to.

[*Commence with one of the forms, ante, p.* 393, *as the case requires.*] The breach [*or* breaches] of another promise [*or* agreement, *or as the case may be*] made by the defendant to the plaintiff [*or* by and be-

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Where successive new assignments occur, each must be contained within the preceding one, and all within the original declaration. (*Pugh* v. *Griffith*, 7 A. & E. 827.)

A new assignment is unnecessary and wrong where the plaintiff having two or more similar causes of action declares in as many several counts (1 Wms. Saund. 299 *a*); for the plaintiff may give evidence of different causes of action under each count, but cannot give in evidence the same cause of action under one of the counts and also under the new assignment. (*Atkinson* v. *Matteson*, 2 T. R. 172.) Where the cause of action is one continuing trespass, part of which is justifiable but the excess is not, the plaintiff is obliged to new assign, and the necessity for a new assignment in such case would not be obviated by inserting a second count, as the plaintiff cannot prove one and the same trespass under two counts. (*Lambert* v. *Hodgson*, 1 Bing. 317.)

Where the plea altogether mistakes the cause of action, it is sufficient to new assign the true cause of action, without taking any notice of the plea further than stating in the new assignment that the plaintiff is not suing for the cause of action admitted by it. But where the plea correctly meets part of the cause or causes of action intended, but restricts their full extent, it then becomes necessary to answer the plea by a replication as well as to new assign. (*Arlett* v. *Ellis*, 7 B. & C. 346; *Cross* v. *Johnson*, 9 B. & C. 613; *Page* v. *Hatchett*, 8 Q. B. 187; *Monkman* v. *Shepherdson*, 11 A. & E. 411.) So it may be that where a single continuing act of trespass is sued for and part of it is justified, the plaintiff, if he disputes the justification, must reply to the justification, and also new assign for the excess. (*Lambert* v. *Hodgson*, 1 Bing. 317; *Loweth* v. *Smith*, 12 M. & W. 582; *Worth* v. *Terrington*, 13 M. & W. 781.) Forms for these two cases of new assignment and also a form involving both cases, are given in the C. L. P. Act, 1852, sched. B. 55, 56, 57. (See *ante*, p. 393.) A replication and new assignment may be pleaded together without leave.

It is necessary to notice that where the plaintiff new assigns to a plea without at the same time replying to it, he by no means admits the truth of the matter therein pleaded; but he passes it by altogether, because, as he asserts in his new assignment, he sues not for the cause of action in the plea admitted, but for other causes of action. Therefore the matter of the plea cannot be treated as admitted by the plaintiff in respect of other parts of the record. (*Norman* v. *Wescombe*, 2 M. & W. 349; *Robertson* v. *Gantlett*, 16 M. & W. 289; *Ellison* v. *Isles*, 11 A. & E. 665.)

The defendant pleads to the new assignment as to a declaration. Under the general issue or other appropriate plea traversing the cause of action, the plaintiff is bound after a new assignment to prove a cause of action other than that admitted in the plea. (*Freeston* v. *Crouch*, Cro. Eliz. 492, cited 11 A. & E. 671.) The defendant cannot repeat his former defence to the new assignment, for the latter is necessarily a cause of action different from that met by such defence, but he may plead any new matter; and if necessary, the plaintiff may new assign to a fresh plea. (And see C. L. P. Act, 1852, s. 88, *infra*.) It may happen however that the defendant has two distinct defences of exactly the same nature, as two rights of way in different

tween the plaintiff and the defendant] than that in the said plea referred to.

New Assignment for other Breaches of the Contract than those pleaded to.

[*Commence with one of the forms, ante, p.* 393, *as the case requires.*] Other breaches of the said promise [*or* agreement, *or as the case may be*] than the said breaches in the said plea referred to.

New assignment to a plea of judgment recovered: see ante, "Judgment Recovered," p. 534.

New assignment, in an action for breaches of covenant in not paying premiums on a policy of insurance to which the defendant

directions over the same close; in which case he must plead them severally, one to the declaration and the other to the new assignment. (*Ellison* v. *Isles*, 11 A. & E. 665.)

Previously to the C. L. P. Act, 1852, when the plaintiff wished to new assign to several pleas of the defendant, he might do so by pleading a new assignment to each plea separately; and it was frequently the practice so to do. And the defendant in pleading to each new assignment would sometimes repeat his former pleas, except that to which the particular new assignment was pleaded. This practice was quite unnecessary, because the plaintiff could gain his whole object by pleading one new assignment to the several pleas of the defendant collectively. He could thereby assert at once a cause of action other than that met by any of the pleas, which he was ultimately obliged to do under the former practice in order to succeed in the action. The practice of new assigning to the several pleas separately was attended with much intricacy and prolixity in the pleadings, and was therefore abolished by the C. L. P. Act, 1852. The following enactments now regulate the practice of new assignments.

By s. 87, "One new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both."

And by s. 88, "No plea which has already been pleaded to the declaration shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits."

The defendant may suffer judgment by default on the new assignment or may pay money into court. He should take care at the same time to relinquish his plea of the general issue, and any other pleas already pleaded, so far as they relate to the matters newly assigned; for otherwise, in case of suffering judgment by default, any pleas pleaded to the whole declaration (including of course the matter of the new assignment) would compel the plaintiff to go to trial, and he would be entitled to his costs; and in case of paying money into court the defendant would leave inconsistent pleas on the record which would lead to the same result, or which he might be compelled to strike out. (1 Wms. Saund. 300 *b* (1); Gray on Costs, chap. xxx.; see form of relinquishment of plea, etc., *supra.*)

Further information on the subject of new assignments may be found in 1 Wms. Saund. 299–300 *i*; 1 Chit. Pl. 7th ed. 653; *Taylor* v. *Cole*, 1 Smith's L. C. 5th ed. 111; and see "*New Assignment*," *post*, ch. 6.

pleaded his bankruptcy, that the plaintiff sued for breaches since the bankruptcy: Elder v. *Beaumont*, 27 L. J. Q. B. 25; 8 E. & B. 353.

New assignment, in an action for breaches of covenant in a lease to which the defendant pleaded an eviction, that the plaintiff sued for breaches before the eviction: Davies v. *Underwood*, 27 L. J. Ex. 113; 2 H. & N. 570.

Relinquishment of Pleas where Defendant suffers Judgment by Default or pays Money into Court as to the Cause of Action newly assigned (a).

The defendant as to the plaintiff's new assignment to the —— plea says that he relinquishes his said —— and —— pleas so far as the same relate to the cause of action above newly assigned. [*If the defendant intends to pay money into court instead of suffering judgment by default, he must continue thus.*] And the defendant, as to the cause of action above newly assigned, brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Nolle Prosequi (b).

Nolle Prosequi to the whole Declaration.

And the plaintiff says that he will not further prosecute his suit against the defendant. Therefore, etc. [See Chit. Forms, 9th ed. 840.]

Nolle Prosequi to Particular Counts.

And the plaintiff, as to the causes of action in the —— and —— counts mentioned [and to which the defendant's —— and —— pleas are pleaded], says that he will not further prosecute his suit against the defendant in respect thereof. Therefore, as to those causes of action, let the defendant be acquitted, and go thereof without day, etc.

(a) See *ante*, p. 555, n. The r. 8, H. T. 1853 (*post*, p. 568), does not apply to this case, so that the defendant may relinquish his plea without the leave of the court or a judge or the consent of the plaintiff or his attorney.

(b) The plaintiff may enter a *nolle prosequi* as to the whole cause of action, or as to one of several counts, or as to part of a count, or, in actions for wrongs, as to one of several defendants. (See 2 Chit. Pr. 11th ed. 1499; Chit. Forms, 9th ed. 840.) As to amending the proceedings upon a misjoinder of defendants, see *ante*, p. 405.

By the 3 & 4 Will. IV. c. 42, s. 32, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for and recover his reasonable costs." And by s. 33, "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for and recover his reasonable costs in that behalf."

Nolle Prosequi to Part of the Causes of Action.

And the plaintiff, as to the causes of action to which the defendant's —— plea is pleaded [*or* as to so much of the causes of action to which the defendant's —— plea is pleaded as relates to, *or* as to the causes of action to which the —— plea is pleaded, except as to £——, parcel of the plaintiff's claim in respect of such causes of action, *or as the case may be*], says that he will not further prosecute his suit against the defendant in respect thereof. Therefore as to those causes [or so much of those causes] of action let the defendant be acquitted and go thereof without day, etc.

A like form after a plea of set-off, see post, p. 582.

Confession of a Plea in Bar of the further Maintenance, or Puis Darrein Continuance (*a*).

The plaintiff confesses the truth of the said plea of the defendant, and prays judgment for his costs of suit in this behalf.

Nolle Prosequi to Part of the Plaintiff's Claim for a Debt to which the Defendant has pleaded, and Judgment by Nil Dicit to the Part unanswered (*b*).

And hereupon the plaintiff says that he will not further prosecute his suit against the defendant in respect of so much of the claim in the declaration mentioned as the defendant's plea is pleaded to: therefore as to so much of the said claim let the defendant be acquitted and go thereof without day, etc. And inasmuch as the defendant has said nothing in bar or preclusion of the action of the plaintiff in respect of the said sum of £——, parcel of the money claimed, and in the said plea excepted, the plaintiff remains therein

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(*a*) Where a defence is pleaded in bar of the further maintenance of the action, or *puis darrein continuance*, the plaintiff may confess the same, and thereupon will be entitled to his costs of the cause up to the time of pleading such plea. (r. 22, 23, T. T. 1853; see *ante*, p. 388; see the entry of the Confession, Chit. Forms, 9th ed. p. 462.) The rule applies to a plea *puis darrein continuance* of the plaintiff's conviction of felony. (*Barnett* v. *London and North-Western Ry. Co.*, 29 L. J. Ex. 334.)

The plea *puis darrein continuance* pleaded as of right itself supersedes the pleas already on the record (*ante*, p. 388), and where there is a plea to the further maintenance pleaded with other pleas, and the plaintiff confesses the former under the above rule, it would seem that the latter pleas are to be wholly disregarded.

(*b*) It sometimes happens that a defendant who has no answer to part of the plaintiff's claim, is not prepared to pay the amount of it into court; and that, in order to avoid the costs of trying an issue fruitlessly, he suffers judgment by default as to this part, and pleads only to the residue. In such a case if the plaintiff proceeds for the residue, no present advantage can be taken of the judgment by default, which will be interlocutory only; so that the defendant gains time, saves costs, and avoids providing any money. The plaintiff may sometimes find it advisable to defeat him in this by entering a *nolle pros.* to the part pleaded to (for which he can afterwards bring another action), and thus take a final judgment at once for the residue. But he should not do this where the part of the debt not pleaded to does not exceed £20, and he wishes to issue a *ca. sa.*, which he may be able to do on a judgment for the whole. (See 7 & 8 Vict. c. 96, s. 57.)

undefended against the defendant, therefore it is considered that the plaintiff do recover against the defendant the said sum of £——, and £—— for his costs of suit.

Nul Tiel Record.

See *ante*, "*Judgment*," p. 528.

Partners (*a*).

Plea that a note was made by the defendants as directors of and on behalf of a mining copartnership, in which the plaintiff was a partner with the defendants: Fox v. *Frith*, 10 M. & W. 131; *Harvey* v. *Kay*, 9 B. & C. 356.

Plea, to an action on a note, that one of the plaintiffs was liable as an indorser, together with the defendant: Mainwaring v. *Newman*, 2 B. & P. 120.

Patents.

General Issue (*b*).

"Never indebted," *ante*, p. 397; "Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

(*a*) In an action on an indebitatus count, under the plea of *never indebted*, the defence that the plaintiff and the defendant are partners and that the cause of action forms part of the partnership transactions, is in general available. (*Bosanquet* v. *Wray*, 6 Taunt. 597; *Worrall* v. *Grayson*, 1 M. & W. 166; *Gregory* v. *Hartnoll*, 1 M. & W. 183; "*Partners*," *ante*, p. 198.)

No action can be brought on a covenant made by the plaintiff with himself and others, or by which the plaintiff covenants to pay money to himself and others. (*De Tastet* v. *Shaw*, 1 B. & Ald. 664; *Faulkner* v. *Lowe*, 2 Ex. 595.)

A plea to an action by a joint stock company, that the defendant was a shareholder in the company, was held bad. (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201; 4 H. & N. 87.)

A plea to an action of covenant, that the defendants covenanted as trustees of a society of which the plaintiff was a member, was held a bad plea. (*Bedford* v. *Brutton*, 1 Bing. N. C. 399.)

A plea to an action for money lent, that it was lent to the defendant for the purpose of carrying on a trading copartnership, of which the plaintiff afterwards became a member, was held bad. (*Garrard* v. *Hardey*, 5 M. & G. 471.)

(*b*) To the declarations relating to patents, *ante*, p. 201, the plea of the general issue will be *nunquam indebitatus*, or *non assumpsit*, or *non est factum*, according to the form of the declaration. In actions to recover

PAYMENT (*a*).

Plea of Payment. (*C. L. P. Act*, 1852, *Sched. B.* 40.)

That before action he satisfied and discharged the plaintiff's claim

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money payable for a license to use a patent, and in actions on contracts for the sale and assignment of patents, it is not in general open to the defendant to dispute the validity of the patent, and pleas to that effect are bad. (*Hills* v. *Laming*, 9 Ex. 256; *Lawes* v. *Purser*, 6 E. & B. 930; 26 L. J. Q. B. 25; *Hall* v. *Conder*, 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; *Smith* v. *Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143; *Smith* v. *Scott*, 28 L. J. C. P. 325.)

(*a*) *Payment.*]—Payment might formerly be given in evidence under the general issue, but by the new rules of H. T. 4 Will. IV. it was required to be specially pleaded; and now r. 14, T. T. 1853, provides in like terms that "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." Therefore in an action on a bill of exchange payment cannot be given in evidence without a plea, though only for the purpose of showing that no interest has accrued due. (*Adams* v. *Palk*, 3 Q. B. 2; and see *Speck* v. *Phillips*, 5 M. & W. 279, 282.)

Where a transaction is for ready money, and the article bought is paid for *eo instanti* on the purchase being made, no debt accrues, and therefore there is no occasion to plead payment. (*Bussey* v. *Barnett*, 9 M. & W. 312; *Wood* v. *Bletcher*, 4 W. R. Ex. 566; but see *Littlechild* v. *Banks*, 7 Q. B. 739; and per Lord Campbell, *Timmins* v. *Gibbins*, 18 Q. B. 722, 726.) So, where there has been a prepayment, or where an antecedent debt from the defendant to the plaintiff was by the agreement taken as part of the price of the goods sold, or work done, such defence may be proved under the general issue. (*Smith* v. *Winter*, 12 C. B. 487.)

Payment of a debt made after the time of payment but before action is a complete defence, and the creditor is not entitled to sue for nominal damages. (*Beaumont* v. *Greathead*, 2 C. B. 494.)

Payment need not be pleaded when credited in the particulars of demand (r. 13, T. T. 1853, cited *ante*, p. 31); but this rule does not apply where the plaintiff seeking to recover a balance does not state the particular sums credited. A defendant will not be compelled to give particulars of his payments under the plea. (*Phipps* v. *Sothern*, 8 Dowl. 208; but see *Ireland* v. *Thompson*, 4 Bing. N. C. 716.)

When payment is pleaded generally to an indebitatus count, it means a payment to any amount which the plaintiff can prove; and upon issue joined on the plea the plaintiff is entitled to recover for any excess which he can establish above the payments proved, up to the full amount of his claim. (*Freeman* v. *Crafts*, 4 M. & W. 4; *James* v. *Lingham*, 5 Bing. N. C. 553; *Alston* v. *Mills*, 9 A. & E. 248; *Moses* v. *Levy*, 4 Q. B. 213.)

By the C. L. P. Act, 1852. s. 75, "Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered." The defendant thus obtains a verdict, and becomes entitled to the costs of the issue for so much as he proves, and the plaintiff is entitled to the verdict and costs for the residue; but the latter are immaterial, unless the residue has been disputed. (See *Traherne* v. *Gardner*, 8 E. & B. 161; 26 L. J. Q. B. 259.) As to what pleas are capable of being construed distributively, see *ante*, p. 377.

Before the above enactment the defendant was bound to prove payment

by payment. [*If the plea is pleaded to part only of the declaration, it must be limited according to one of the forms ante, pp.* 383, 384.]

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of the debt proved against him to the full amount of his plea; otherwise he lost the verdict (unless the excess of the debt was covered by other pleas on which he succeeded), and the payment proved went only in reduction of damages. (*Cousins* v. *Paddon*, 2 C. M. & R. 547; *Tuck* v. *Tuck*, 5 M. & W. 109; *Kilner* v. *Bailey*, 5 M. & W. 382.)

A payment of a smaller sum in discharge of a greater liquidated debt is no defence; there being no consideration for giving up the remainder. (*Wright* v. *Acres*, 6 A. & E. 726; *Down* v. *Hatcher*, 10 A. & E. 121.) The general form of plea given by the C. L. P. Act, 1852, sched. B. 40, prevents this objection from appearing on the record. (And see *Turner* v. *Collins*, 2 L. M. & P. 99; 20 L. J. Q. B. 259; *ante*, p. 47, n.)

Payment of a smaller sum may amount to a discharge of a larger debt when it is made under a valid contract to that effect: as where it is agreed to be paid before the whole debt is due, or where it is paid by a third party (see *Lewis* v. *Jones*, 4 B. & C. 506, 513; *Welby* v. *Drake*, 1 C. & P. 557), or where it is paid in discharge of an unliquidated demand, or where it is paid as a composition for the debt under an arrangement with creditors. (*Wilkinson* v. *Byers*, 1 A. & E. 106; *Sibree* v. *Tripp*, 15 M. & W. 23; and see Chit. Contracts, 6th ed. 653.) Payment of a smaller sum, with an agreement to abandon a defence and pay costs, may be pleaded in accord and satisfaction of a larger demand liquidated or unliquidated. (*Cooper* v. *Parker*, 15 C. B. 822.) The defence in these cases must be pleaded according to the facts, and cannot be given in evidence under the common plea of payment. (See *ante*, "*Accord and Satisfaction*," p. 412.)

The giving and accepting of a negotiable security, as a bill or note *for and on account* of the cause of action, suspends the right of action during the running of the security and until default in payment, and constitutes a good defence to an action during that time, which must be specially pleaded. (See *ante*, "*Bill taken for the Debt*," p. 464.) If the security is duly paid, it operates as payment of the cause of action, and may be proved under the common plea of payment. (See *Fearn* v. *Cochrane*, 4 C. B. 274.) If the security is dishonoured, and is in the hands of the plaintiff, the original right of action revives. A negotiable security may also be given and accepted in complete *satisfaction and discharge* of the cause of action, and not merely *for and on account* thereof as above; the transaction then becomes an accord and satisfaction. (See *ante*, p. 415.) A security for a smaller sum cannot be given *for and on account* of a larger sum due, and a plea to that effect would be bad (*Thomas* v. *Heathorn*, 2 B. & C. 477); but such a security, if negotiable, may be given and accepted in satisfaction and discharge. (*Sibree* v. *Tripp*, 15 M. & W. 23.) Whether the security is given and accepted in the one sense or the other is a question of fact depending on the actual agreement made between the parties. (*Ib.*; *Goldshede* v. *Cottrell*, 2 M. & W. 20; and see *Maillard* v. *Duke of Argyle*, 6 M. & G. 40.) The acceptance of a check drawn by the debtor operates as payment until it is presented and dishonoured (per Patteson, J., *Pearce* v. *Davis*, 1 M. & R. 365); but not so, if the check is not unconditional in its terms. (*Hough* v. *May*, 4 A. & E. 954.)

Payment by or to an agent, or by or to one of several partners, or joint debtors or joint creditors, may be pleaded in the above general form. (*Beaumont* v. *Greathead*, 2 C. B. 494; *Thorne* v. *Smith*, 10 C. B. 659; and see *Wallace* v. *Kelsall*, 7 M. & W. 264.) So a payment to the plaintiff's wife. (*Offley* v. *Clay*, 2 M. & G. 172.)

A doubt sometimes occurs whether a particular transaction amounts to a payment or a set-off (see *Fidgett* v. *Penny*, 1 C. M. & R. 108; *Thomas* v.

Plea of payment by the allowance of cross demands in an account stated, and payment of the balance: Sutton v. *Page*, 3 C. B. 204; *Callander* v. *Howard*, 10 C. B. 290; *and see ante*, "*Accounts Stated*," p. 44, n. (*a*).

Plea of payment of a smaller sum by a third person: ante, p. 416.

Plea of payment to a judgment-creditor of the plaintiff under an order of attachment under the garnishee clauses of the C. L. P. Act, 1854: *ante*, p. 428.

Plea of Payment after the Commencement of the Suit (*a*).

That after the commencement of this suit he satisfied and discharged the plaintiff's claim [and all damages and costs in respect thereof] by payment.

PAYMENT INTO COURT (*b*).

Plea of Payment into Court. (*C. L. P. Act*, 1852, *s.* 71.)

The defendant, by —— his attorney [*or* in person *and if the plea is pleaded to part only of the declaration say* as to the —— count

Cross, 7 Ex. 728); in such a case it is safest to plead both pleas, for evidence under the one is not admissible under the other. (*Cooper* v. *Morecraft*, 3 M. & W. 500.)

(*a*) Payment after action brought is not a complete defence unless made in satisfaction of all damages and costs of the action as well as of the debt. (*Goodwin* v. *Cremer*, 18 Q. B. 757.) Where payment is made after action brought in respect of the debt only, the plaintiff is entitled to continue the action for nominal damages and costs of the action. (*Nosotti* v. *Page*, 10 C. B. 643.) The payment cannot be given in evidence, even in mitigation of damages, unless pleaded. (*Ib.*; and see *ante*, p. 388.) Where payment after action brought is pleaded to an amount claimed and all damages in respect thereof, the defendant must prove that the payment was made and accepted in satisfaction and discharge of all the damages and costs, as well as of the debt. (*Thame* v. *Boast*, 12 Q. B. 808.) Thus where the defendant pleaded to part of the claim in an indebitatus count payment after action of an equal sum in satisfaction of the part of the claim pleaded to and of all damages in respect thereof, and he proved payment and acceptance of that sum without any mention made of costs, the plaintiff was held to be entitled to a verdict for nominal damages. (*Cook* v. *Hopewell*, 11 Ex. 555; 25 L. J. Ex. 71.)

The plea may be pleaded to an amount claimed only without including the damages in respect thereof, and is a good defence to so much of the claim as it professes to answer. (*Henry* v. *Earl*, 8 M. & W. 228.)

By the r. 22, T. T. 1853 (cited *ante*, p. 388), the plaintiff may confess the plea and obtain his costs up to the time of pleading.

(*b*) *Payment into Court.*]—This plea was given generally in actions on contracts by the statute 3 & 4 Will. IV. c. 42, s. 21, which enactment is now extended by the C. L. P. Act, 1852, ss. 70, 71. Before these statutes a practice existed of paying money into court as amends; but the payment was

of the declaration, *or* as to £—— parcel of the money claimed, *or* as to the residue of the money claimed, *or as the case may be: see the commencements of pleas, ante, p.* 384] brings into court the sum of

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not entered upon the record by way of plea. (*Tattersall* v. *Parkinson*, 16 M. & W. 752, 759; 1 Wms. Saund. 33 *g*.)

The C. L. P. Act, 1852, s. 70, enacts that "It shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, or debauching the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants, to pay into court a sum of money by way of compensation or amends."

By s. 71, when money is paid into court, such payment shall be pleaded in all cases, as near as may be, in the form there given, *mutatis mutandis*. (See forms *supra*.)

By s. 72, "No rule or judge's order to pay money into court shall be necessary, except in the case of one or more of several defendants, but money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff, or to his attorney, upon a written authority from the plaintiff, on demand."

And by s. 73, "The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and to sign judgment for his costs of suit so taxed; or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit." (See these replications, *post*, p. 564.)

By r. 12, H. T. 1853, "When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, is entitled to the costs of the cause in respect of that part of his claim so satisfied up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for Plea,' but not before." (See *Harold* v. *Smith*, 29 L. J. Ex. 141.)

If less than £20 is paid in and accepted in satisfaction, it is not a recovery within the meaning of the County Court Act, 13 & 14 Vict. c. 61, s. 11, and the plaintiff is entitled to his costs without an order or a certificate (*Chambers* v. *Wiles*, 24 L. J. Q. B. 267); but on the lower scale. (See the Directions to the Masters, H. T. 1853, 7.)

In actions on money-bonds payment into court might be made by the statute 4 & 5 Anne, c. 16, s. 13, but could not be pleaded (*England* v. *Watson*, 9 M. & W. 333); but now, by the C. L. P. Act, 1860, s. 25, cited *ante*, p. 468, payment into court may be pleaded in such actions.

In actions on bonds within 8 & 9 Will. III. c. 11, payment into court cannot be pleaded, the plaintiff being entitled to judgment on the bond as security for further breaches. (*Bp. London* v. *M'Neil*, 9 Ex. 490.)

Payment into court may be pleaded to one count out of several, or to a severable part of the causes of action contained in one count, or to one or more of the breaches alleged, or to part of an indebitatus count; and the commencement of the plea must be limited accordingly. One plea of pay-

£ ——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

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Plea of Payment into Court to Part of an Indebitatus Count, with the General Issue and other Pleas to the Residue. (*See ante, p.* 384.)

1. The defendant by *G. H.* his attorney [*or* in person], except as

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ment into court may be pleaded to all the counts collectively, or to one count containing several breaches, without stating how much of the payment is applied to each count or breach. (*Jourdain* v. *Johnston*, 2 C. M. & R. 564; *Marshall* v. *Whiteside*, 1 M. & W. 188.)

The defendant will not, in general, be ordered to deliver particulars of the items to which the money is paid in (*Thames Ironworks Co.* v. *Royal Mail Steam Packet Co.*, 10 C. B. N. S. 375; 30 L. J. C. P. 265); but where the declaration joins several distinct causes of action, particulars may be ordered. (per Erle, C. J., *Ib.*) In an action against a carrier for the loss and damage of various goods sent to different places at different times, where money was paid into court generally, the court refused to set aside a judge's order for particulars of the items to which it was paid in. (*Baxendale* v. *Great Western Ry. Co.*, 6 H. & N. 95; 30 L. J. Ex. 63.)

Where payment into court is pleaded to part only of the claim, and there are other pleas to other parts, the plea of payment into court is generally pleaded last, the part to which it is pleaded being excepted from the preceding pleas as in the form above given. (*Sharman* v. *Stevenson*, 3 Dowl. 709; *Coates* v. *Stevens*, 3 Dowl. 784.)

The amount paid into court must cover the damages, or the debt and damages to which it is pleaded, up to the time of pleading; and interest, if payable, must be computed up to that time, and not only up to the commencement of the action; otherwise the defendant would lose the issue upon the replication of damages *ultra*. (*Kidd* v. *Walker*, 2 B. & Ad. 705.) The claim at the end of an indebitatus count includes both debt and damages, and therefore it is sufficient in respect of that claim, or of a portion of it, to pay into court an exactly equal sum. The plea to part of such a count must specify the amount to which it is pleaded, and must be accompanied by the general issue or other plea to the declaration except as to that part, as in the form given above. (*Grimsley* v. *Parker*, 3 Ex. 610; and see *Armfield* v. *Burgin*, 6 M. & W. 281.)

The plea of payment into court of a smaller sum than the sum pleaded to is a bad plea; for the payment of a smaller sum cannot alone amount to satisfaction of a larger sum admitted to be due. (*Tattersall* v. *Parkinson*, 16 M. & W. 752; but see *Turner* v. *Collins*, 2 L. M. & P. 99; *ante*, p. 47.)

The plea of payment into court has important effects by way of admission. It admits all material allegations in the declaration, which the plaintiff might be compelled to prove in order to recover the money paid in. (*Dyer* v. *Ashton*, 1 B. & C. 3; *Cooper* v. *Blick*, 2 Q. B. 915.) Accordingly in an action on a special contract it admits the contract and the breach (*Fischer* v. *Aide*, 3 M. & W. 486; *Archer* v. *English*, 1 M. & G. 873; *M'Cance* v. *London and North Western Ry. Co.*, 31 L. J. Ex. 65); and if the plea be general to the whole declaration, it admits some damages to be due on all and on every part of the breaches. (*Wright* v. *Goddard*, 8 A. & E. 144.) In a declaration on a special contract with two breaches laid, payment into court on one of the breaches admits not only that breach, but also the contract, although the defendant disputes the other breach. (*Dyer* v. *Ashton*, 1 B. & C. 3.) Where the declaration is in the form of an indebitatus count, the plea admits a debt upon the consideration stated in the declaration to the amount paid in, but no more; so that the plaintiff is bound to prove a further debt in order to recover a greater amount. (*King-*

to £—— parcel of the money claimed, says that he never was indebted as alleged.

2. And for a second plea the defendant, except as to the said £—— parcel of the money claimed, says [*here state the substance of the plea, limiting it to the part pleaded to, which may be referred to as* the claim of the plaintiff herein pleaded to].

3. And for a third [*or* fourth, *or as the case may be*] plea the defendant as to the said £—— brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Plea of Payment into Court to a Cause of Action newly assigned, and relinquishment of Pleas: ante, p. 556.

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ham v. *Robins*, 5 M. & W. 94; *Goff* v. *Harris*, 5 M. & G. 573; *Edan* v. *Dudfield*, 1 Q. B. 302, 304.) Thus in an action for work and labour done by the plaintiff as an attorney, under the issue of damages *ultra*, it is open to the defendants to dispute the plaintiff's retainer as to the further debt claimed. (*Steavenson* v. *Corporation of Berwick*, 1 Q. B. 154.) In an action for medicines supplied and work done by the plaintiff as an apothecary, under the issue as to the sufficiency of the payment into court, the plaintiff is bound to prove his certificate as an apothecary under the statute 55 Geo. III. c. 194, s. 21. (*Shearwood* v. *Hay*, 5 A. & E. 383.) So under an indebitatus count against defendants jointly, who pay money into court to part, the plaintiff must prove a debt beyond the amount paid in, and also that it is a joint debt. (*Stapleton* v. *Nowell*, 6 M. & W. 9; *Charles* v. *Branker*, 12 M. & W. 743; *Archer* v. *English*, 1 M. & G. 873.) Particulars of demand, if there are any, do not extend or in any way affect the admission. (*Meager* v. *Smith*, 4 B. & Ad. 673.)

A defendant will not be allowed to plead any other plea to the same cause of action to which he pleads payment into court, nor can he plead to any allegation which is necessarily admitted by the payment. (*Thompson* v. *Jackson*, 1 M. & G. 242; *O'Brien* v. *Clement*, 13 M. & W. 435; *Hart* v. *Denny*, 1 H. & N. 609; *Gales* v. *Holland*, 7 E. & B. 336; see "*Pleading several Matters*," *ante*, p. 256.) But if such inconsistent pleas are pleaded, they are considered separately, and the admission of the cause of action in the one cannot be called in aid in proof of the other. (*Fischer* v. *Aide*, 3 M. & W. 486; *Twemlow* v. *Oakley*, 3 M. & W. 495.)

Under the issue of damages *ultra*, the defendant cannot give evidence of any matter which might have been pleaded as a defence to the cause of action admitted by payment into court. He is restricted to such evidence in reduction of damages as is admissible for that purpose under the general issue. (*Goldy* v. *Goldy*, 26 L. J. Ex. 29.) Thus under this issue in an action for the wrongful dismissal of a servant, he cannot, in mitigation of damages, prove that he discharged the plaintiff on the ground of drunkenness. (*Speck* v. *Phillips*, 5 M. & W. 279.) So in an action for not granting a lease according to an agreement, the defendant cannot under it give evidence to show that the plaintiff knew at the time of making the agreement that the defendant had no title. (*Robinson* v. *Harman*, 18 L. J. Ex. 202.)

The plea of payment into court also debars the defendant from afterwards moving in arrest of judgment, or taking any objection, however valid, to the sufficiency of the cause of action to which he has so pleaded. (*Wright* v *Goddard*, 8 A. & E. 144.)

As to the practice and proceedings upon the plea of payment into court, see Chit. P. 11th ed. 1351; Chit. Forms, 9th ed. 790.

Replication of Acceptance of the Sum in Satisfaction (C. L. P. Act, 1852, s. 73) (a).

That he accepts the sum paid into court in full satisfaction and discharge of the cause [*or* causes] of action in respect of which it has been paid in.

Replication that the Sum paid in is not enough. (C. L. P. Act, 1852, s. 73.)

That the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded.

Promissory Notes.

See *ante*, "*Bills of Exchange*," *etc.*, p. 446.

Recognisance. *Ante*, p. 435.

Release (*b*).

(*a*) Where a plaintiff accepted money out of court in satisfaction under a mistake as to the effect of his declaration, and the consequences of the payment and acceptance of the money, he was allowed to amend on repaying the money to the defendant with costs. (*Emery* v. *Webster*, 9. Ex. 242; and see *Webster* v. *Emery*, 10 Ex. 901.)

(*b*) *Release.*]—A release of a cause of action once accrued must be by deed under seal. (*Harris* v. *Goodwyn*, 2 M. & G. 405.) A parol discharge of a cause of action (except in the case of a parol waiver of a bill or note, see ante, p. 458) is available as a defence only when it forms part of a contract made upon a good consideration and executed; the defence then amounts to an *accord and satisfaction*. (*Ante*, p. 412.) A receipt in full for a debt is only evidence of payment, and must be pleaded as such; and it is then open to the plaintiff to show that no payment was in fact made. (*Foster* v. *Dawber*, 6 Ex. 839, 848; *Farrar* v. *Hutchinson*, 9 A. & E. 641.) An agreement amounting in its terms to a release, but not under seal, may be pleaded as a defence upon equitable grounds. (*De Pothonier* v. *Mattos*, 27 L. J. Q. B. 260.) Where an agreement made in consideration of forbearing a right under a covenant in a deed has been performed, the facts will form a good plea on equitable grounds in discharge of the covenant (per Willes, J., *Nash* v. *Armstrong*, 10 C. B. N. S. 259).

A replication setting up any parol exception or qualification of a release under seal is bad. (*Brooks* v. *Stuart*, 9 A. & E. 854; *Cocks* v. *Nash*, 9 Bing. 341.) And a replication on equitable grounds that a stipulation in a deed declared upon, the performance of which was traversed in the plea, was waived by parol, was held bad as being a departure from the declaration. (*Thames Iron Works Co.* v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169.)

A release of one co-debtor in general releases all the co-debtors; there being but one and the same debt for which all are liable. (*Nicholson* v. *Revill*, 4 A. & E. 675, 683.) But the original contract may expressly reserve to

Plea of Release. (*C. L. P. Act*, 1852, *Sched. B.* 42.)

That after the alleged claim accrued and before this suit the plaintiff by deed released the defendant therefrom (*a*).

A special plea, to an action by the public officer of a banking company, of a release executed by the manager on behalf and by the authority of the company: Bell v. *Tuckett*, 3 M. & G. 785.

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the creditor the right of giving a release to one without discharging the others. (*Cowper* v. *Smith*, 4 M. & W. 519.) The creditor may give such a qualified release to one, by inserting therein an express reservation of his right of action against the others. (*North* v. *Wakefield*, 13 Q. B. 536; *Solly* v. *Forbes*, 2 B. & B. 38; *Thompson* v. *Lack*, 3 C. B. 540; *Price* v. *Barker*, 4 E. & B. 760; and see *Willis* v. *De Castro*, *infra*.) Extrinsic evidence of such reservation cannot be given. (*Cocks* v. *Nash*, 9 Bing. 341; *Brooks* v. *Stuart*, 9 A. & E. 854.) A plea of a release to an executor of one of joint obligors was held bad, because on the death of the one the debt survived against the others. (*Ashbee* v. *Pidduck*, 1 M. & W. 564.) But if the deceased obligor was the principal debtor and the others sureties, the release might operate as an equitable discharge, and might be pleaded as a defence upon equitable grounds.

So also, a release given by one of several co-creditors will in general release the cause of action as to all. (*Wilkinson* v. *Lindo*, 7 M. & W. 81.) If such a release is obtained by the fraud of the debtor upon the releasing creditor, it may be answered, as in the case of a release given by a single creditor, by a replication that it was obtained by fraud; but in that case the court will not interfere in a summary manner to set aside the plea of release. (*Wild* v. *Williams*, 6 M. & W. 490; and per Parke, B., *Phillips* v. *Clagett*, 11 M. & W. 84, 93.) If it is executed by collusion between the releasing creditor and the debtor in order to defraud the plaintiff, the plaintiff, may apply to the summary jurisdiction of the court to strike the plea out. (*Barker* v. *Richardson*, 1 Y. & J. 362; *Phillips* v. *Clagett*, 11 M. & W. 84; *Rawstorne* v. *Gandell*, 15 M. & W. 304.) If a release from the nominal plaintiff, whose name appears only as a trustee, to the prejudice of the real plaintiff, is pleaded, the plea may be set aside by an application to the summary jurisdiction of the court. (*Legh* v. *Legh*, 1 B. & P. 447; *Innell* v. *Newman*, 4 B. & Ald. 419; and see *Rawstorne* v. *Gandell*, *supra*.) In such cases the plaintiff might also plead a replication on equitable grounds that the release was fraudulent and collusive. (*De Pothonier* v. *Mattos*, 27 L. J. Q. B. 260.)

A covenant not to sue amounts to a release, and may be so pleaded upon the ground of avoiding circuity of action. (2 Wms. Saund. 47 *gg*.) But a covenant not to sue for a limited time has not this effect and is no defence. (*Thimbleby* v. *Barron*, 3 M. & W. 210; and see *ante*, p. 478 (*a*).) A covenant with one of several co-debtors not to sue him does not operate as a release of the others. (*Dean* v. *Newhall*, 8 T. R. 168; *Price* v. *Barker*, 4 E. & B. 460; *Willis* v. *De Castro*, 27 L. J. C. P. 243.) Nor does a covenant by one of several joint-creditors not to sue the debtor operate as a release by the other joint-creditors. (*Walmesley* v. *Cooper*, 11 A. & E. 216.) A release in terms of one joint-debtor, reserving remedies against the other, amounts only to a covenant not to sue and not to a release. (*Willis* v. *De Castro*, *supra*.)

(*a*) A defendant relying upon a deed as a release must either plead it expressly as such, or must set out the words of the deed for the court to judge whether it amounts to a release. (*Wilson* v. *Braddyll*, 23 L. J. Ex. 227; 9 Ex. 718.) But it seems not to be essential in the former case to aver that the release was by deed, see *Thames Haven Dock Co.* v. *Brymer*, 5 Ex. 696; *Thames Ironworks Co.* v. *Royal Mail Co.*, 31 L. J. C. P. 169; *Solvency Mutual Guarantee Co.* v. *Froane*, 7 H. & N. 5.

Plea of the Release of a Co-contractor.

That the alleged debts were contracted by [*or* promise *or* agreement was made by, *or* causes of action accrued against] the defendant and *J. K.* [and *L. M.*] jointly, and not by [*or* against] the defendant alone, and after the accruing of the alleged debts [*or* causes of action] the plaintiff by deed released the said *J. K.* [and *L. M.*] therefrom.

A like plea: Willis v. *De Castro*, 27 L. J. C. P. 243; 4 C. B. N. S. 216.

Plea of release by deed of arrangement under the Bankruptcy Act, 1861, 24 & 25 *Vict. c.* 134, *s.* 192; *ante*, *p.* 441.

Pleas of release by deed of arrangement under the Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c.* 106, *ss.* 224–229; *ante*, *p.* 443.

Replication traversing the Release. (*C. L. P. Act*, 1852, *Sched. B.* 50.) (*a*)

That the alleged release is not the plaintiff's deed.

Replication that the Release was obtained by Fraud. (*C. L. P. Act*, 1852, *Sched. B.* 51.)

That the said release was procured by the fraud of the defendant.

Replication of a subsequent alteration in the release by the insertion of the amount without the consent of the plaintiff: Fazakerly v. *M'Knight*, 26 L. J. Q. B. 30; 6 E. & B. 795; *see ante*, "*Alteration of written Contract*," *p.* 420.

Replication setting out the deed which showed a release subject to certain conditions, and averring that the conditions had not been satisfied: Nevill v. *Boyle*, 11 M. & W. 26; *Hyde* v. *Watts*, 12 M. & W. 254.

Replication on equitable grounds that before the release the plaintiff had assigned the cause of action to another person of which the defendant had notice, and that the release was made without the authority or consent of the assignee who now sued in the plaintiff's name: De Pothonier v. *De Mattos*, 27 L. J. Q. B. 260; *see ante*, "*Equitable Pleas*," *p.* 486.

Replication on equitable grounds that the release, though in general terms, was not intended by the parties to include the present claim: Lyall v. *Edwards*, 30 L. J. Ex. 193.

(*a*) This replication puts in issue the execution of the deed, and the alleged effect of it as a release. (*North* v. *Wakefield*, 13 Q. B. 536; *Wilkinson* v. *Lindo*, 7 M. & W. 81; and see *ante*, "*Non est Factum*," p. 403.) If the deed is set out in full in the plea, its effect as a release may be questioned by demurrer (ib.). If the plea purports to give the legal effect of the deed, and the plaintiff disputes the alleged effect and wishes to raise the question by demurrer, he may set out the deed *verbatim* in his replication, and thus compel the defendant to demur. (*Ante*, p. 402.)

Relinquishment of Plea (*a*).

Entry of Relinquishment of Plea.

And the defendant, as to the plaintiff's replication [*or* demurrer] to the defendant's —— plea, says that he relinquishes his said —— plea, and abandons all verification thereof.

Like forms: M'Intyre v. *Miller*, 13 M. & W. 725; *Davidson* v. *Bohn*, 5 C. B. 170.

Relinquishment of pleas so far as they apply to causes of action newly assigned: see ante, "New Assignment," p. 556.

Replevin Bond.

General Issue (*b*).

"Non est factum," *ante*, p. 403.

Pleas traversing the breaches assigned: Axford v. *Perrett*, 4 Bing. 586; *Perreau* v. *Bevan*, 5 B. & C. 284.

Pleas that the defendant was ready to prosecute his action of replevin with effect and without delay, but was prevented by the plaintiff not appearing: Harrison v. *Wardle*, 5 B. & Ad. 146.

Plea that the replevin suit is still pending and undetermined: Brackenbury v. *Pell*, 12 East, 585; *Rider* v. *Edwards*, 3 M. & G. 202. [*A replication traversing this plea must show how the suit is determined: Brackenbury* v. *Pell*, 12 East, 585.]

Plea, in an action against a surety to the bond, that the judgment in the replevin suit was obtained collusively between the plaintiff and the tenant in fraud of the defendant: Moore v. *Bowmaker*, 7 Taunt. 97.

Rescission of Contract (*c*).

Plea that the Contract was rescinded before Breach.

That after the alleged contract and before any breach thereof, it

(*a*) By r. 8, H. T. 1853, "the defendant shall not be at liberty to waive his plea, or enter a *relictâ verificatione* after a demurrer, without leave of the court or a judge, unless by consent of the plaintiff or his attorney." As to when leave will be granted to withdraw a plea, see 1 Chit. Pr. 11th ed. p. 297.

(*b*) The plea of the general issue, *non est factum*, denies that the defendant executed a bond to the effect stated in the declaration. (*Glover* v. *Coles*, 1 Bing. 6; *Faulkner* v. *Johnson*, 11 M. & W. 581; *ante*, "*Bonds*," p. 466.)

(*c*) *Rescission of contract.*]—It is competent to the parties to a contract at any time before breach of it by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it. (*Goss* v. *Lord*

was agreed by and between the plaintiff and the defendant that the said contract should be rescinded; and they then rescinded the same accordingly.

Plea, to an action on a deed, that the deed was cancelled with the consent of the plaintiff and defendant: Webber v. *Granville*, 30 L. J. C. P. 92 [*held a bad plea to an action for the rent reserved in a lease, Ward* v. *Lumley*, 5 H. & N. 87; 29 L. J. Ex. 322.]

Nugent, 5 B. & Ad. 65.) The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it and may be so pleaded, without any performance or satisfaction which is required to constitute a good plea of accord and satisfaction after breach. (*Taylor* v. *Hilary*, 1 C. M. & R. 741.) So also an agreement by the parties to a contract to rescind it, if made before any breach has been committed, forms a defence to an action brought upon the contract so rescinded. A contract cannot be rescinded without the consent of both parties. (*Franklin* v. *Millar*, 4 A. & E. 599, 606; *Fitt* v. *Cassanet*, 4 M. & G. 898.)

If the original contract was under seal, it can be altered or discharged only by deed. (*Rippinghall* v. *Lloyd*, 5 B. & Ad. 742; *Gwynne* v. *Davy*, 1 M. & G. 857; *West* v. *Blakeway*, 2 M. & G. 729; *Ellen* v. *Topp*, 6 Ex. 424.) And a plea of a subsequent parol contract pleaded to an action on a covenant would be a bad plea. (Ib.; *Spence* v. *Healey*, 8 Ex. 668; *Smith* v. *Trowsdale*, 3 E. & B. 83.) An agreement not to enforce the performance of the covenants in a deed is a good consideration for a new promise (*Nash* v. *Armstrong*, 10 C. B. N. S. 259); and if the promise made on such consideration has been performed, these facts would be ground for a good equitable plea to an action on the covenants. (per Willes, J., *Ib.*)

It is sufficient in a declaration to aver that a term of a contract under seal was discharged without saying by deed (*Thames Haven Dock Co.* v. *Brymer*, 5 Ex. 696); but the averment imports that it was discharged by deed, so where to such a declaration it was pleaded that the discharge was not by deed, a replication on equitable grounds that the discharge was made by a parol agreement was held bad as being a departure from the declaration, and showing that there was no legal right under the deed. (*Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169.) A plea, in an action on a deed, that the contract was rescinded, not stating by deed, was held good on demurrer. (*Solvency Mutual Guarantee Co.* v. *Froane*, 7 H. & N. 5.)

If the original contract was such that the law required it to be in writing, an alteration in any part must also be in writing, although the part altered be such that, if the subject of an original contract, it might be agreed upon without writing. (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Harvey* v. *Grabham*, 5 A. & E. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 937; *Marshall* v. *Lynn*, 6 M. & W. 109; *Giraud* v. *Richmond*, 2 C. B. 835.) The question whether, where the original contract is such as must by law be made in writing, it can be wholly abandoned or rescinded by parol agreement, was left undecided in *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 66; and see *Harvey* v. *Grabham*, 5 A. & E. 61, 74; 2 Taylor on Evidence, 3rd ed. 926.

If the original contract was put in writing merely by the will of the parties, and not in consequence of a requirement of law, it may be partially altered or wholly rescinded by parol agreement without writing.

A contract required by law to be made in writing, need not be so alleged in a declaration; but a plea setting up such a contract or an alteration in its terms must allege that the contract or alteration was made in writing. (*Case* v. *Barber*, Sir T. Raym. 450; *Whittaker* v. *Mason*, 2 Bing. N. C. 359; *Adams* v. *Wordley*, 1 M. & W. 374.)

A plea of a substituted agreement or of a rescission or exoneration after

Plea, in an action on a time policy, that before the loss the policy was cancelled upon a return of the premium for unexpired time: Baines v. *Woodfall,* 28 L. J. C. P. 338; 6 C. B. N. S. 657.

Plea that the Plaintiff exonerated and discharged the Defendant from his Promise (see note, infra).

That after the alleged promise and before any breach thereof the plaintiff exonerated and discharged the defendant from his said promise and from the performance of the same.

Like pleas: King v. *Gillett,* 7 M. & W. 55; *Gouldham* v. *Edwards,* 17 C. B. 141; *Hobson* v. *Cowley,* 27 L. J. Ex. 205; *Davis* v. *Bomford,* 30 L. J. Ex. 139.

Sale: I. Of Goods.

General Issue (*a*).

"Never indebted," *ante,* p. 397; "Non assumpsit," *ante,* p. 401.

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breach would be a bad plea. A breach committed and right of action consequently vested can be discharged only by an accord and satisfaction (*Edwards* v. *Chapman,* 1 M. & W. 231), or by a release under seal (*Goldham* v. *Edwards,* 17 C. B. 141) (except in the case of waiver of bills of exchange and promissory notes, as to which see *ante,* p. 458).

The rescission of the contract is sometimes pleaded in the form that before any breach the plaintiff exonerated and discharged the defendant from his promise. (*King* v. *Gillett,* 7 M. & W. 55; *Goldham* v. *Edwards,* 17 C. B. 141.) But in order to support the plea the defendant must prove a mutual exoneration agreed to on both sides before breach, amounting to a rescission of the contract. (*Ib.*; and see *Reid* v. *Hoskins,* 26 L. J. Q. B. 5; 6 E. & B. 961.) A plea of exoneration and discharge may also be supported by proof of a substituted agreement. (*Hobson* v. *Cowley,* 27 L. J. Ex. 205.)

A plea alleging that the defendant committed the breach by the leave and licence of the plaintiff was held bad in an action for not completing a contract of sale. (*Dobson* v. *Espie,* 2 H. & N. 79; 26 L. J. Ex. 240.) Leave and licence given before breach may in some cases be used in evidence under a traverse of the breach to show that the act complained of was not in fact a breach of the contract. (*West* v. *Blakeway,* 2 M. & G. 729; *Rawlinson* v. *Clarke,* 14 M. & W. 187.)

A breach of a contract in a material point by one party may sometimes be treated by the other as an assent to rescind it, which the latter may accede to; and he may plead rescission of the contract in answer to an action for an alleged breach on his part. (*Robson* v. *Drummond,* 2 B. & Ad. 303; *Withers* v. *Reynolds,* 2 B. & Ad. 882; *Planché* v. *Colburn,* 8 Bing. 14; *Franklin* v. *Millar,* 4 A. & E. 599.) A renunciation of the contract or a total refusal to perform it before the time of performance has arrived may be acted upon by the other party, and may justify his rescinding the contract. (*Hochster* v. *De Latour,* 2 E. & B. 678; *Avery* v. *Bowden,* 26 L. J. Q. B. 3; 6 E. & B. 953; *Reid* v. *Hoskins,* 26 L. J. Q. B. 5; 6 E. & B. 961; *Barwick* v. *Buba,* 26 L. J. C. P. 280; and see the notes to *Cutter* v. *Powell,* 2 Smith's L. C. 1.)

(*a*) As to the effect of the general issue *never indebted* to the indebitatus counts for goods sold and delivered and goods bargained and sold, see *ante,* p. 399. The general issue *non assumpsit* to a special count on a contract of sale denies the contract alleged. Under this issue the plaintiff must prove

Plea traversing the Sale.

That the plaintiff did not bargain and sell to the defendant, nor did the defendant buy from the plaintiff, the said goods at the price and upon the terms alleged.

Plea traversing the Non-payment for the Goods.

That he paid the plaintiff the said price for the said goods according to the terms of the said contract.

Plea traversing the Non-acceptance of the Goods.

That he accepted the said goods according to the terms of the said contract.

Plea denying that the Plaintiff was ready and willing to deliver the Goods.

That the plaintiff was not ready and willing to deliver the said goods to the defendant according to the terms of the said contract.

Pleas to actions for not accepting the goods.

That the plaintiff was not ready and willing to deliver goods equal to the contract: Jones v. *Clarke,* 2 H. & N. 725.

That the goods tendered were not equal to sample: Sierĕking v. *Dutton,* 3 C. B. 331; *Dawson* v. *Collis,* 10 C. B. 523.

That the goods tendered were not in merchantable condition: Bull v. *Robison,* 10 Ex. 342.

That the plaintiff was not ready and willing to deliver the goods within a reasonable time: Attwood v. *Emery,* 1 C. B. N. S. 110; *Ellis* v. *Thompson,* 3 M. & W. 445; *Startup* v. *Macdonald,* 6 M. & G. 593.

Plea traversing the Non-delivery.

That he did deliver the said goods to the plaintiff according to the terms of the said contract.

Plea denying that the Plaintiff was ready and willing to accept.

That the plaintiff was not ready and willing to accept the said goods according to the terms of the said contract.

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the contract; and the defendant may rely upon any variance between the terms of the consideration or promise alleged and those proved, or upon want of consideration, or may take any objections arising out of the Statute of Frauds or the Stamp Acts. (See *ante,* p. 403.) The performance of conditions precedent must be denied specifically; and the breaches alleged must be traversed in terms. A breach of warranty is no defence to an action by the seller for the price of goods; but may be given in evidence in reduction of damages. (See *ante,* pp. 231, 232.)

Plea denying that the Plaintiff was ready and willing to pay for the Goods.

That the plaintiff was not ready and willing to pay for the said goods according to the terms of the said contract.

Sale: II. Of Land.

General Issue (*a*).

"Never indebted," *ante*, p. 397; "Non assumpsit," *ante*, p. 401.

Plea denying that the Plaintiff made a good Title.

That the plaintiff did not on or before the said —— day of ——, A.D. ——, deduce and make a good title to the said premises [*add, if necessary*, subject as in the said agreement *or* conditions of sale in that behalf mentioned] according to the terms of the said agreement [*or* the said conditions of sale].

Plea that the Plaintiff was not possessed of the Term sold.

That the plaintiff was not at the time of the alleged breach possessed of the said messuage and premises for the said residue of the said term of years as alleged. [*See De Medina* v. *Norman*, 9 M. & W. 820; *and see ante*, p. 217, n. (*a*).]

Plea denying that the Plaintiff was ready to convey.

That the plaintiff was not ready and willing to grant and convey to the defendant the said land and premises according to the terms of the said agreement [*or* the said conditions of sale].

Plea denying that the Plaintiff tendered a Conveyance for Execution.

That the plaintiff did not on or before the said —— day of —— A.D. ——, tender to the defendant for execution any deed or deeds for conveying the said land and premises to the plaintiff.

Plea that the vendor delivered an abstract, to which the purchaser

(*a*) The plea of the general issue *never indebted* to the indebitatus count for the purchase-money of an estate, puts in issue an actual conveyance of the land by deed. (See *ante*, p. 214.)

The general issue *non assumpsit* to a special count on a contract for the sale of land puts in issue the contract, which the plaintiff must prove as alleged, and under this issue the defendant may rely on any objections founded on the Statute of Frauds or the Stamp Acts. (See *ante*, p. 401, 403.) The performance of conditions precedent, if denied, must be specifically traversed, whether they are expressly imposed by the contract or inferred from the usual course of practice, as making a good title, delivering an abstract, tendering a conveyance, etc. (See *Jones* v. *Berkeley*, 7 M. & W. 482; *Poole* v. *Hill*, 6 M. & W. 835; and see the cases cited above.) The breach, if denied, must be traversed in terms; and if excused, the matter of excuse must be pleaded. (See pleas traversing and excusing the breaches charged, *Rippinhall* v. *Lloyd*, 5 B. & Ad. 742.)

raised no objection within the stipulated time: Smith v. *Tanner*, 1 M. & G. 803.

Plea that the vendor made a good title according to the conditions of sale: Simmons v. *Heseltine*, 28 L. J. C. P. 129; 5 C. B. N. S. 554.

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SET-OFF (*a*).

Plea of Set-off. (*C. L. P. Act*, 1852, *Schedule B*, 41.)

That the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's

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(*a*) *Set-off.*]—Before the Statutes of Set-off the defendant in an action at law could not set off against the claim of the plaintiff debts due to him from the plaintiff, although he could obtain relief in a court of equity.

By the statute 2 Geo. II. c. 22, s. 13, "Where there are mutual debts between the plaintiff and the defendant, or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other."

This statute was made perpetual by the 8 Geo. II. c. 24, which further enacted (s. 5), "that mutual debts may be set against each other notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty where the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid." By r. 8, T. T. 1853, re-enacting in this respect the new rules of pleading of Will. IV., the defence of set-off must be specially pleaded. (*Graham* v. *Partridge*, 1 M. & W. 395.)

The statute applies only where the claims on both sides are liquidated debts or money demands which can be ascertained with certainty at the time of pleading. It is not applicable where the claim on either side is for unliquidated damages, as a claim under a guarantee for the debt of a third person (*Morley* v. *Inglis*, 4 Bing. N. C. 58; *Williams* v. *Flight*, 2 Dowl. N. S. 11; and see *Hutchinson* v. *Sidney*, 10 Ex. 438); a claim under a contract of indemnity against actions, damages, and costs (*Attwooll* v. *Attwooll*, 2 E. & B. 23); a claim for damages for delaying a ship which is not agreed demurrage according to the terms of the charterparty (*Seeger* v. *Duthie*, 29 L. J. C. P. 253; 8 C. B. N. S. 45; and see *Horn* v. *Bensusan*, 9 C. & P. 709); a claim for not accepting a bill of exchange for the price of goods sold before the credit for the goods is expired (*Hutchinson* v. *Reid*, 3 Camp. 329); the claim of an accommodation acceptor of a bill for an indemnity against being compelled to pay the bill (*Hardcastle* v. *Netherwood*, 5 B. & Ald. 93, except as to the amount of the bill and interest *Crampton* v. *Walker*, 30 L. J. Q. B. 19). A claim against an underwriter on a policy of marine insurance for a loss before adjustment is not a debt within the statute. (*Thomson* v. *Redman*, 11 M. & W. 487; *Castelli* v. *Boddington*, 22 L. J. Q. B. 5; *Beckwith* v. *Bullen*, 27 L. J. Q. B. 163; 8 E. & B. 682.) A statement of special damage in the declaration will not exclude the set-off, provided the cause of action sued upon substantially results in a liquidated debt. (*Birch* v. *Depeyster*, 4 Camp. 385; *Crampton* v. *Walker*, 30 L. J. Q. B. 19; and see *Groom* v. *West*, 8 A. & E. 758; *Gibson* v. *Bell*, 1 Bing. N. C. 743.)

In some cases the plaintiff is entitled to frame his cause of action either

claim for [*here state the cause of set-off as in a declaration*] goods sold and delivered by the defendant to the plaintiff, and for goods bargained and sold by the defendant to the plaintiff, and for work done and materials for the same provided by the defendant for the

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as a breach of a special contract entitling him to claim unliquidated damages, or as a debt; as where an agent entrusted with the money of his principal for a special purpose disposes of it contrary to his instructions, the principal may sue the agent in a special count for the breach of contract, or, if the contract is rescinded, may claim the return of the money in an indebitatus count. (See *ante*, p. 38.) If he sues in a special count for unliquidated damages, a set-off is not admissible. (*Thorpe* v. *Thorpe*, 3 B. & Ad. 580.) If he claims the money under an indebitatus count, a set-off may be pleaded. (*Colson* v. *Welch*, 1 Esp. 378; *Hill* v. *Smith*, 12 M. & W. 618.) Where the declaration claims partly a liquidated debt and partly unliquidated damages, the defendant may sever so much of the plaintiff's claim as is liquidated from the rest, and plead a set-off as to that part. (*Hardcastle* v. *Netherwood*, 5 B. & Ald. 93; *Crampton* v. *Walker*, 30 L. J. Q. B. 19; *Brown* v. *Tibbits*, 31 L. J. C. P. 206.)

The debts must be *mutual* and in the same right. A joint debt due from the plaintiff and another to the defendant cannot be set off against a debt due to the plaintiff solely (*Arnold* v. *Bainbrigge*, 9 Ex. 153); and a debt due from the defendant to one partner in a firm cannot be set off against a debt due from the defendant to the firm. (*France* v. *White*, 6 M. & G. 33; *Gordon* v. *Ellis*, 2 C. B. 821.) But a defendant may plead that the debt sued for was due from himself and another jointly, and a set-off of debts due to them jointly from the plaintiff (*Stackwood* v. *Dunn*, 3 Q. B. 822); and the defendant may plead a set-off of a joint and several promissory note of the plaintiff and others made to the defendant. (*Owen* v. *Wilkinson*, 5 C. B. N. S. 526.)

Where several plaintiffs are joined in the action under the C. L. P. Act, 1860, s. 19 (see *ante*, p. 405), it is provided by s. 20, that "upon the trial of such cause a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him."

The defendant cannot, at law, plead that the plaintiff sues as trustee for a third person, and a set-off in respect of a debt due to the defendant from the latter (*Isberg* v. *Bowden*, 8 Ex. 852, overruling *Bottomley* v. *Brooke*, and *Rudge* v. *Birch*, cited 1 T. R. 621, 622); and the defendant cannot so plead a set-off of a bond given by the plaintiff to a third party and assigned to the defendant. (*Wake* v. *Tinkler*, 16 East, 36.) But it has been decided that a plea of set-off on equitable grounds may be pleaded in respect of a debt due from the plaintiff to a trustee for the defendant (*Cockrane* v. *Green*, 30 L. J. C. P. 97; 9 C. B. N. S. 448); and therefore a similar plea in respect of a debt due from the real plaintiff for whom the nominal plaintiff is trustee would seem to be admissible.

In an action against an incorporated company, or the public officer of a banking company, the defendants may set off calls due from the plaintiff to the company (*Moore* v. *Metropolitan Sewage Co.*, 3 Ex. 333; *Milvain* v. *Mather*, 5 Ex. 55), and may plead the set-off in the statutory form given for the count for calls. (*Ante* p. 119; *Moore* v. *Metropolitan Sewage Co.*, *supra*.)

In an action by the plaintiff as executor, the defendant cannot set off a debt due to him from the plaintiff in his own right (*Hutchinson* v. *Sturges*, Willes, 261, 263); nor can a defendant sued as executor set off a debt due from the plaintiff to him personally.

In an action by an executor for money received by the defendant to the

plaintiff at his request, and for money lent by the defendant to the plaintiff, and for money paid by the defendant for the plaintiff at his request, and for money received by the plaintiff for the use of

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use of the plaintiff as executor, and upon an account stated between them, the defendant cannot set off debts due to him from the testator in his lifetime (*Tegetmeyer* v. *Lumley*, Willes, 264, n.; *Schofield* v. *Corbett*, 11 Q. B. 779; *Rees* v. *Watts*, 25 L. J. Ex. 30; 9 Ex. 696; 11 Ex. 410); and in an action against an executor for a debt due to the plaintiff from the testator, the defendant cannot set off a debt which accrued due to him as executor. (*Mardall* v. *Thellusson*, 6 E. & B. 976.) But in an action by or against an executor, if it appears on the pleadings that the debts sued for were due to and from the testator in his lifetime, the set-off may be supported as within the statute; so perhaps in the case of a debt due upon an account stated with the executor *in respect of such debts*. (*Ib.*; *Blakesley* v. *Smallwood*, 8 Q. B. 538; and see 2 Wms. Exors. 5th ed. p. 1700, 1767.)

By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 171, repeating previous enactments, it is provided, "that where there has been *mutual credit* given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account and no more shall be claimed or paid on either side respectively; and every debt or demand provable against the estate of the bankrupt may also be set off against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

Mutual credits under this section include transactions which must in their nature terminate in debts. (*Rose* v. *Hart*, 8 Taunt. 499; and see the notes on this case in 2 Smith's L. C. 5th ed. 251.) Thus a claim for not accepting a bill of exchange in payment of goods sold, is a credit to which a set-off may be pleaded, as it must have terminated in a debt. (*Gibson* v. *Bell*, 1 Bing. N. C. 754; *Groom* v. *West*, 8 A. & E. 758); but a claim on a contract by the defendant to indorse a bill is not such a credit, for if the bill had been indorsed, the acceptor would be the debtor, and defendant only liable for damages on his guarantee as surety (*Rose* v. *Sims*, 1 B. & Ad. 521); so in general a claim for unliquidated damages is not a *credit* within the above enactment. (*Bell* v. *Carey*, 8 C. B. 887.) A claim for a loss on a policy of insurance, before adjustment, is a *credit* within this statute, though not a debt within the general statute of set-off. (*Ante*, p. 573; *Beckwith* v. *Bullen*, 27 L. J. Q. B. 163; 8 E. & B. 682; *Lee* v. *Bullen*, 8 E. & B. 692 (*a*).)

In an action by the assignees of a bankrupt upon a cause of action accruing to them as assignees since the bankruptcy, unless it be one which arose out of a credit given by the bankrupt before the bankruptcy or before petition and before notice of an act of bankruptcy (*Hulme* v. *Mugglestone*, 3 M. & W. 30; *Bittlestone* v. *Timmins*, 1 C. B. 339), the defendant cannot set off debts due to him from the bankrupt before bankruptcy. (*Groom* v. *Mealey*, 2 Bing. N. C. 138; *Wood* v. *Smith*, 4 M. & W. 522.)

Debts accruing due after the commencement of the action are not within the Statute of Set-off, and cannot be pleaded in bar to the further maintenance. (*Richards* v. *James*, 2 Ex. 471; and see in Equity, *Maw* v. *Ulyatt*, 31 L. J. C. 33.) The debt must continue due until the time of trial, so that a replication that the plaintiff paid the debt since the plea of set-off is a good replication (*Eyton* v. *Littledale*, 4 Ex. 159); but payment of the debt before or after the plea may be shown under the usual traverse that the defendant was not nor is indebted (*Stockbridge* v. *Sussams*, 3 Q. B. 239); or under a replication merely taking issue.

The defendant is not bound to avail himself of a set-off, but may reserve

the defendant, and for interest (*a*) upon money due from the plaintiff to the defendant and forborne at interest by the defendant to the plaintiff at his request, and for money found to be due from the plaintiff to the defendant on accounts stated between them, which amount the defendant is willing to set off against the plaintiff's claim. [*If the set-off is pleaded to part of the claim, or to all except part, the plea must be limited accordingly: see forms, ante, pp.* 383, 384.]

Particulars of Set-off (*b*).

In the ——.

Between *A. B.*, plaintiff, and *E. F.*, defendant.

The following are the particulars of the defendant's set-off in this action. [*State the particulars of set-off in the same manner as particulars of demand: see ante, p.* 46.]

Dated the —— day of ——,

Yours, etc.,

G. H. defendant's attorney [*or* agent.]

To Mr. *C. D.* plaintiff's attorney or agent.

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it for a cross action. (*Laing* v. *Campbell*, 1 Camp. 252.) An equitable set-off may also be reserved and asserted subsequently in a Court of Equity. (*Jenner* v. *Davis*, 30 L. J. C. 361.)

The amount of set-off proved by the defendant is not recovered by the plaintiff in the action within the County Courts Act, 13 & 14 Vict. c. 62, s. 11, so that if the plaintiff recovers less than £20 above the amount of the set-off he is deprived of costs under that Act. (*Ashcroft* v. *Foulkes*, 18 C. B. 261; *Beard* v. *Perry*, 31 L. J. Q. B. 180; overruling on this point *Tonge* v. *Chadwick*, 5 E. & B. 950.)

One plea of set-off may be pleaded generally to the whole claim to which the plea is applicable, without specifying how much is intended to apply to each cause of debt. (*Noel* v. *Davis*, 4 M. & W. 138.)

The form of the plea of set-off is given in the C. L. P. Act, 1852, sched. B. 41, *supra*. By s. 75 of that Act, cited *ante*, "*Payment*," p. 559, the plea is to be taken distributively, and each party is entitled to a verdict and costs in respect of the portion on which he succeeds.

As to the equitable jurisdiction of the court to set off cross-judgments and claims for costs between the same parties, see 1 Chit. Pr. 11th ed. p. 711.

(*a*) Interest must be claimed in the plea of set-off as a debt; it cannot be given in the form of damages.

(*b*) *Particulars of set-off.*]—By r. 19, H. T. 1853, "with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And if any plea of set-off shall be delivered without such particulars, and a judge shall afterwards order a delivery of particulars, the defendant shall not be allowed any costs in respect of any summons for the purpose of obtaining such order or of the particulars he may afterwards deliver." (See *ante*, "*Particulars of Demand*," p. 46.) This is the only consequence of notdelivering particulars with the plea. A judge's order for particulars generally provides that, in default of delivering the particulars as required by the order, the defendant shall not be allowed to give evidence of the set-off at the trial. (2 Chit. Pr. 11th ed. 1450.)

Statement of a Set-off upon a Bill of Exchange accepted by the Plaintiff.

Upon a bill of exchange, dated the —— day of ——, A.D. ——, and overdue before this suit, drawn by the defendant upon and accepted by the plaintiff, whereby the defendant required the plaintiff to pay to the defendant £—— —— months after date.

Statement of a Set-off on a Bill of Exchange indorsed by the Plaintiff to the Defendant.

Upon a bill of exchange, dated the —— day of ——, A.D.——, and overdue before this suit, drawn by the plaintiff upon *I. K.*, whereby the plaintiff requested the said *I. K.* to pay to the plaintiff or his order £—— —— months after date, which said bill of exchange was indorsed by the plaintiff to [*L. M.* and by the said *L. M.* to] the defendant, and was duly presented for payment and was dishonoured, whereof the plaintiff had due notice.

Statement of a Set-off on a Promissory Note made by the Plaintiff.

Upon a promissory note, dated the —— day of ——, A.D. ——, and overdue before this suit, made by the plaintiff, whereby he promised to pay the defendant £—— —— months after date.

Statement of a Set-off on a Promissory Note indorsed by the Plaintiff to the Defendant.

Upon a promissory note, dated the —— day of ——, A.D. ——, and overdue before this suit, made by *I. K.*, whereby he promised to pay to the plaintiff or order £—— —— months after date, and which said promissory note was indorsed by the plaintiff to [*L. M.* and by the said *L. M.* to] the defendant, and was duly presented for payment and was dishonoured, whereof the plaintiff had due notice.

Statement of a Set-off on a Bond (a).

Upon a bond of the plaintiff, bearing date the —— day of ——, A.D. ——, whereby he became bound to the defendant in the sum of £—— to be paid by the plaintiff to the defendant, subject to a condition for the payment of £—— at a time which had elapsed before this suit [*according to the condition of the bond*]; and upon which bond there was at the commencement of this suit and still is £—— due from the plaintiff to the defendant.

(*a*) In pleading a set-off, either against or in respect of debts accruing by reason of a penalty contained in a bond, it is necessary, in accordance with the statute (cited *ante*, p. 573) to show how much is truly and justly due, either as being pleaded to or as being set off; and such averment is material and traversable. (*Symmons* v. *Knox*, 3 T. R. 65; *Grimwood* v. *Barrit*, 6 T. R. 460.) A set-off cannot be pleaded to a bond which is not conditioned to secure a liquidated demand, as a bond to indemnify generally. (*Attwooll* v. *Attwooll*, 2 E. & B. 23, *ante*, p. 573.)

Statement of a Set-off on a Covenant.

Upon a deed bearing date the —— day of ——, A.D. ——, whereby the plaintiff covenanted with the defendant to pay to the defendant £—— on a day which had elapsed before this suit, with interest for the same in the meantime at the rate of £—— per cent. per annum.

Statement of a Set-off upon a Judgment.

Upon a judgment recovered by the defendant, on the —— day of ——, A.D. ——, in the Court of ——, at Westminster, against the plaintiff for £——, together with £—— for the plaintiff's costs of suit, which said judgment still remains in force and unsatisfied.

Plea of set-off upon a judgment recovered in the county court: Stanton v. *Styles*, 5 Ex. 578.

Statement of a Set-off for Liquidated Damages under a Covenant or Agreement.

For liquidated damages due from the plaintiff to the defendant, under articles of agreement [*or* an agreement], dated the —— day of ——, A.D. ——, and made by and between the plaintiff and the defendant, whereby the plaintiff covenanted with [*or* for a good and sufficient consideration agreed with *or* promised] the defendant to pay him such liquidated damages on the happening of certain events, which happened before this suit.

A fuller Statement of a Set-off for Liquidated Damages, for not completing a Building Contract by a certain Day.

For liquidated damages due from the plaintiff to the defendant under an agreement made by and between them, whereby it was agreed that, in consideration of a certain sum of money to be paid by the defendant to the plaintiff, the plaintiff should build and complete certain buildings for the defendant as therein mentioned on or before the —— day of ——, A.D. ——, and that if the plaintiff should not so complete the same as aforesaid on or before that day, he should forfeit and pay to the defendant as liquidated damages £—— for each day after the said —— day of ——, A.D. ——, during which the said buildings should not be so completed as aforesaid; and the plaintiff did not complete the said buildings as aforesaid on or before the said —— day of —— or for —— days afterwards, which period elapsed before this suit, and thereby divers sums of £——, amounting to £—— at the commencement of this suit, were and still are due from the plaintiff to the defendant, as such liquidated damages as aforesaid, under the said agreement.

Like pleas: Fletcher v. *Dyche*, 2 T. R. 32; *Macintosh* v. *Midland Counties Ry. Co.*, 14 M. & W. 548.

A like plea, making allowance for the time required for extra work under the contract: Legge v. *Harlock*, 12 Q. B. 1015.

Plea that by the terms of the agreement the penalties for non-completion were to be paid out of the price: Thornhill v. *Neats*, 8 C. B. N. S. 831.

Plea of a set-off of a debt due under a special agreement: Pelly v. *Sidney*, 28 L. J. C. P. 182; 5 C. B. N. S. 679.

Plea of Set-off to an Action on a Bond. (*See ante*, p. 577 (*a*).)

That the said bond was and is subject to a condition thereunder written, to make void the same upon payment by the defendant to the plaintiff on the —— day of ——, A.D. ——, of £——, with interest for the same in the meantime at £—— per cent. per annum, and at the commencement of this suit there was and still is £—— due from the defendant to the plaintiff upon the said bond; and the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim in respect of the said £—— for [*here state the cause of set-off as in a declaration*], which amount the defendant is willing to set off against the plaintiff's claim in respect of the said £——.

A like plea: Lee v. *Lester*, 7 C. B. 1008; *and see Collins* v. *Collins*, 2 Burr. 820.

Replication that more was due under the bond than the sum alleged: Symmons v. *Knox*, 3 T. R. 65; *Grimwood* v. *Barrit*, 6 T. R. 460.

Plea, to an Action by an Executor for Debts due to the Testator in his Lifetime, of a Set-off of Debts due from the Testator in his Lifetime to the Defendant (*a*).

That the said *C. D.* at the time of his death was indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the causes of set-off as in a declaration against an executor on causes of action accrued against the testator in his lifetime, ante*, p. 131.] which said amount at the commencement of this suit was and still is due from the plaintiff as executor as aforesaid to the defendant; and the defendant is willing to set off the said amount against the plaintiff's claim.

Plea, to an Action against an Executor for Debts due from the Testator in his Lifetime, of a Set-off of Debts due to the Testator in his Lifetime (*b*).

That the plaintiff at the time of the death of the said *G. H.* was indebted to the said *G. H.* in an amount equal to the plaintiff's claim for [*here state the causes of set-off as in a declaration by an executor on causes of action accrued to the deceased, ante*, p. 129], which said amount at the commencement of this suit was and still is due from the plaintiff to the defendant as executor as aforesaid; and the defendant as executor as aforesaid is willing to set-off the said amount against the plaintiff's claim.

(*a*) See *ante*, p. 575. If the declaration claims debts which accrued due to the plaintiff as executor after the testator's death as well as debts due to the testator in his lifetime, the plea must be limited to the latter; and if the declaration is ambiguous in this respect, the plea should begin by alleging that the debts accrued due to the testator in his lifetime.

(*b*) See *ante*, p. 575. As this plea can be pleaded only to debts due from the testator in his lifetime it must be limited if necessary.

Plea, to an Action by the Assignees of a Bankrupt for Debts due to the Bankrupt, of a Set-off of Debts due from the Bankrupt before Bankruptcy (*a*).

That the said *E. F.* at the time of his bankruptcy was indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the debts or credits to be set off*], which said amount at the commencement of this suit was and still is due to the defendant; and the defendant is willing to set off the said amount against the plaintiffs' claim.

Plea, to an Action by the Assignees of a Bankrupt for Debts due to the Bankrupt, of a Set-off of Debts due from the Bankrupt after the Act of Bankruptcy without notice.

That the said *E. F.* at the time of the filing of the petition for adjudication of bankruptcy against him was indebted to the defendant in an amount equal to the plaintiffs' claim for [*here state the debts or credits to be set off*]; and the defendant had not when he gave credit to the said *E. F.* in respect of the said amount or any part thereof notice of any prior act of bankruptcy committed by the said *E. F.*, and the said amount at the commencement of this suit was and still is due to the defendant; and the defendant is willing to set off the said amount against the plaintiffs' claim.

Pleas of set-off of mutual credits under the Bankrupt Laws (*see Bankrupt Law Consolidation Act*, 1849, *s.* 171): *Groom* v. *West*, 8 A. & E. 758; *Gibson* v. *Bell*, 1 Bing. N. C. 754; *Hulme* v. *Muggleston*e, 3 M. & W. 30; *Bittlestone* v. *Timmis*, 1 C. B. 339.

Plea, in an Action for Goods sold, that they were sold by the Plaintiff's Agent, and a Set-off against the Agent.

That the said goods were sold and delivered to the defendant by *J. K.*, then being the agent of the plaintiff in that behalf and entrusted by the plaintiff with the possession of the said goods as apparent owner thereof; and the said *J. K.*, having possession of the said goods as aforesaid, sold and delivered the same to the defendant in his own name and as his own goods with the consent of the plaintiff; and at the time of the said sale and delivery of the said goods the defendant did not know and had not the means of knowing that the plaintiff was the owner of the said goods, or was interested

(*a*) This and the next form are in general applicable only to claims by the assignees in respect of causes of action accrued to the bankrupt before the bankruptcy, and cannot be pleaded to claims by the assignees in respect of causes of action accrued to them since the bankruptcy. (*Groom* v. *Mealey*, 2 Bing. N. C. 138; *Wood* v. *Smith*, 4 M. & W. 522; *ante*, p. 575.) But where the assignees sue for money had and received by the defendant for their use as assignees since the bankruptcy, if he can show by his plea that it was so received in consequence of credit previously given to him by the bankrupt, a set-off of a mutual credit or debt before the bankruptcy may be pleaded to it under the provisions of the Bankrupt Law Consolidation Act, 1849, s. 171, cited *ante*, p. 575. (*Hulme* v. *Mugglestone*, 3 M. & W. 30; *Bittlestone* v. *Timmis*, 1 C. B. 339.)

therein, or in the said sale thereof, or that the said *J. K.* was the agent of the plaintiff in that behalf; and before the defendant knew that the plaintiff was the owner of the said goods or any of them, or interested therein, or that the said *J. K.* was the agent of the plaintiff in the sale thereof, the said *J. K.* became, and at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the cause of set-off against J. K.*], which amount the defendant is willing to set off against the plaintiff's claim.

A like plea: Carr v. *Hinchliff*, 4 B. & C. 547.

Plea that the Debt was a joint Debt of the Defendant and another person, and a Set-off of Debts due to them from the Plaintiff. (*See ante*, p. 574.)

That the alleged debts were contracted by the defendant and *J. K.* jointly and not by the defendant alone, and the plaintiff at the commencement of this suit was and still is indebted to the defendant and the said *J. K.* in an amount equal to the plaintiff's claim for [*here state the cause of set-off as in a declaration, showing that it accrued to the defendant and J. K. jointly, see form ante, p. 200*]; which amount the defendant and the said *J. K.* are willing to set off against the plaintiff's claim.

A like plea: Stackwood v. *Dunn*, 3 Q. B. 822.

Plea on equitable grounds of a set-off of a judgment recovered against the plaintiff by a trustee for the defendant on notes of the plaintiff indorsed to the trustee to hold for the defendant: Cochrane v. *Green*, 9 C. B. N. S. 448.

Replication traversing the Set-off (*a*).

That he was not nor is indebted as alleged.

(*a*) This form of traverse is frequently adopted in practice; but it is sufficient for the plaintiff to take issue on the plea. The latter is generally the more advisable mode of replying, in order to preserve the issues in the same order as the pleas. (See *ante*, p. 391.) Either form will be applicable although the plea includes claims on bills or notes, as the r. 7 T. T. 1853, *ante*, p. 446, does not apply to replications; but where a plea of set-off is founded on matter of record or specialty the only proper forms of traverse are *nul tiel record* in the former case (*Salomons* v. *Lyon*, 1 East. 369), and *non est factum* in the latter (*Milvain* v. *Mather*, 5 Ex. 55). The plaintiff may reply to a plea of set-off on a bond that a larger sum is due than that alleged in the plea. (See *ante*, p. 579.)

As a set-off must be existing at the time of action brought (*Richards* v. *James*, 2 Ex. 476) and continuing up to the time of trial (*Eyton* v. *Littledale*, 4 Ex. 159), and as r. 8, T. T. 1853, does not apply to replications, any answer to the plea which shows that the debt never did or does not at the time of the trial continue to exist is admissible under the above traverse or under the joinder of issue: thus illegality or fraud may be proved under it; or the defendant may show that the debts are not mutual, as that the alleged set-off was due to the plaintiff from himself jointly with another. (*Arnold*

Replication traversing the Set-off against an Executor.

That the said *C. D.* was not at the time of his death indebted to the defendant as alleged.

Replication admitting the whole Set-off and entering a Nolle Prosequi (*a*).

The plaintiff as to the defendant's —— plea admits that he was and still is indebted to the defendant in an amount equal to the claim therein pleaded to as in that plea alleged; and he is willing to set-off the said amount against so much of the plaintiff's claim as is therein pleaded to, and therefore will not further prosecute his suit in respect of so much of his said claim as the said —— plea is pleaded to.

A like replication: Goodee v. *Goldsmith*, 2 M. & W. 202.

Replication admitting Part of the Set-off and entering a Nolle Prosequi to that Amount, and traversing the Residue (*b*).

That as to £——, parcel of the money sought to be set off in the said plea, the plaintiff admits that he was and still is indebted to the defendant in that amount as alleged; and the plaintiff is willing to set off the said £—— against an equal sum of £——, parcel of the plaintiff's claim to which the said plea is pleaded, and therefore will not further prosecute his suit in respect of the said £——, parcel of the plaintiff's claim; and the plaintiff as to the residue of the said plea says that he was not nor is he indebted as therein alleged [*or* takes *or* joins issue thereon].

A like replication: Amor v. *Cuthbert*, 1 Dowl. N. S. 160; 3 M. & G. 1.

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v. *Bainbrigge*, 9 Ex. 153.) Payment at any time before trial may be given in evidence under the issue; but where the plaintiff replied that he *never was* indebted, instead of that he *was not nor is* indebted as alleged, it was held that he was precluded by the form of his plea from proving payment. (*Brown* v. *Daubeny*, 4 Dowl. 585; *Harvey* v. *Hofman*, 2 Dowl. N. S. 683; *Stockbridge* v. *Sussams*, 3 Q. B. 239; *Miller* v. *Atlee*, 3 Ex. 799.) Payment by a third party for the plaintiff without his authority, but ratified by him at the trial, is an answer to the plea. (*Simpson* v. *Eggington*, 10 Ex. 845.)

Answers to the set-off which admit the existence of the debt but show the remedy to be barred, as the Statute of Limitations, or the bankruptcy or insolvency of the plaintiff, must be specially replied. (*Chapple* v. *Durston*, 1 C. & J. 1; *Ford* v. *Dornford*, 8 Q. B. 583.)

(*a*) If the plaintiff cannot deny the set-off, or some part of it, it will be inexpedient to raise an issue on which he must be defeated. He may avoid this by amending his particulars of demand and giving credit for so much of the set-off as he admits (which he will be allowed to do on such terms as a judge may think reasonable), or he may, in his replication, admit the set-off wholly or in part in one of the forms given above. (*Amor* v. *Cuthbert*, 1 Dowl. N. S. 160; 3 M. & G. 1; *Goodee* v. *Goldsmith*. 2 M. & W. 202.)

(*b*) If part of the set-off is admitted, it is advisable to amend the particulars of demand, or to make the admission on the record, in order to avoid the costs of the defendant's proof (see the preceding note).

Replication of the Statute of Limitations to a Plea of Set-off. (*C. L. P. Act*, 1852, *Sched. B.* 52 (*a*).)

That the alleged set-off did not accrue within six years before this suit.

Replications, to pleas of set-off, of the discharge of the plaintiff under the Bankruptcy or Insolvency Acts may be framed from the forms, ante, p. 437. [*This answer to the set-off must be replied specially: Ford* v. *Dornford*, 8 Q. B. 583.]

Replications, to pleas of set-off, of the bankruptcy or insolvency of the defendant, and the vesting of the causes of set-off in his assignees, may be framed from the forms, ante, p. 439.

SPIRITUOUS LIQUORS. See *ante*, p. 512.

STOCK-JOBBING (*b*).

Pleas under the Stock-Jobbing Act, 7 *Geo. II. c.* 8.

Plea, to an action for work done, that the work was done by the plaintiff as a broker in transacting stock-jobbing contracts for the defendants: Wells v. *Porter*, 2 Bing. N. C. 722; *Oakley* v. *Rigby*, 2 Bing. N. C. 732; *Elsworth* v. *Cole*, 2 M. & W. 31.

Plea, to an action on a bill, that it was given as a security for differences on a stock-jobbing contract: Robson v. *Fallows*, 3 Bing. N. C. 392; *Slegg* v. *Phillips*, 4 A. & E. 852.

(*a*) The Statute of Limitations must be replied specially to a plea of set-off, and cannot be relied on under a replication taking issue. (*Chapple* v. *Durston*, 1 C. & J. 1.) The set-off must have been barred before the commencement of the suit in order to support a replication of the statute. (*Walker* v. *Clements*, 15 Q. B. 1046.)

(*b*) By the 7 Geo. II. c. 8, s. 1, repealed by 23 Vict. c. 28, it was enacted "that all contracts and agreements whatsoever upon which any premium or consideration in the nature of a premium shall be given or paid for liberty to put upon or to deliver, receive, accept or refuse any public or joint-stock or other public securities whatsoever, or any part, share or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of putts and refusals relating to the then present or future price or value of any such stock or securities as aforesaid, shall be void; and all premiums, sum or sums of money whatsoever, which shall be given, received, paid or delivered, upon all such contracts or agreements, or upon any such wagers or contracts in the nature of wagers as aforesaid, shall be restored and repaid to the person or persons who shall give, pay or deliver the same, who shall be at liberty within six months from and after the making such contract or agreement or laying any such wager to sue for and recover the same from the person or persons to whom the same is or shall be paid and delivered, with double costs of suit, by action of debt founded on this Act; and it shall be sufficient therein for the plaintiff to allege that the defendant is indebted to the plaintiff or has received to the plaintiff's use the money or premium so paid or received, whereby the plaintiff's ac-

Plea, to an action for money paid, that it was paid for differences on stock-jobbing contracts: Mortimer v. *Gell*, 4 C. B. 543.

Plea, in an action by the assignees of a bankrupt for money received, that the money was collected and received by the defendant on behalf of the bankrupt in payment of stock-jobbing contracts under which it became due to the bankrupt; and that by the rules of the Stock Exchange, upon the bankruptcy, such money became distributable amongst the creditors of the bankrupt on Stock Exchange transactions: Nicholson v. *Gooch*, 25 L. J. Q. B. 137; 5 E. & B. 999.

Substituted Agreement.

See *ante*, "*Rescission of Contract*," p. 568.

Sunday Trading.

Pleas that the contract was made upon a Sunday: under 29 Car. II. c. 7, s. 1; *Norton* v. *Powell*, 4 M. & G. 42; *Peate* v. *Dicken*, 1 C. M. & R. 422; *Simpson* v. *Nicholls*, 3 M. & W. 240. [*As to the construction of the above statute and the decisions upon it, see Chitty on Contracts, 5th ed.* 374.]

Tender (*a*).

Plea of Tender.

That he always was and still is ready and willing to pay to the plaintiff the said £——, and before action [*or if the debt was pay-*

tion accrued to him according to the form of this statute, without setting forth the special matter."

This enactment did not apply to foreign stock (*Wells* v. *Porter*, 2 Bing. N. C. 722; *Oakley* v. *Rigby*, 2 Bing. N. C. 732; *Elsworth* v. *Cole*, 2 M. & W. 31); nor to railway shares. (*Hewitt* v. *Price*, 4 M. & G. 355.)

Money paid by the plaintiff at the defendant's request on account of a stock-jobbing contract within the above Act cannot be recovered. (*Mortimer* v. *Gell*, 4 C. B. 543; and see per Parke, B., *Pidgeon* v. *Burslem*, 3 Ex. 465, 471.) So money lent for the express purpose of settling losses on stock-jobbing transactions cannot be recovered back. (*Caman* v. *Bryce*, 3 B. & Ald. 179.) The defence, which may still occur, must be specially pleaded.

(*a*) *Tender.*]—The defence of tender consists in the defendant having been always ready and willing to pay the debt and having tendered it before action to the plaintiff, who refused to accept it. It is a performance of the contract on the part of the defendant so far as he could perform it, and was not prevented by the plaintiff.

If the debt be payable on a certain day, as by a bond conditioned to pay a sum of money on a particular day, or by the acceptance of a bill, or the

able on a day certain, on the said —— day of ——, A.D. ——] he tendered and offered to pay the same to the plaintiff, and the plaintiff refused to accept it; and the defendant now brings the said £—— into court ready to be paid to the plaintiff. [*If the plea is pleaded to part only of the declaration, it must be limited according to one of the forms, ante, pp.* 383, 384. *Any other pleas must then be limited*

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making of a promissory note, the debtor is bound to tender on the precise day, and cannot plead a tender made *post diem.* (2 Wms. Saund. 48 *b* (i); *Hume* v. *Peploe,* 8 East, 168; *Poole* v. *Tumbridge,* 2 M. & W. 223; *Dixon* v. *Clark,* 5 C. B. 365, 379; *Dobie* v. *Larkan,* 10 Ex. 776.) The drawer or indorser of a bill may tender the amount within a reasonable time after notice of dishonour and before action. (*Walker* v. *Barnes,* 5 Taunt. 240; but see *Siggers* v. *Lewis,* 1 C. M. & R. 370.) Where a bill or note is payable on demand, a tender of the amount of the note with interest may be made at any time before action. (*Norton* v. *Ellam,* 2 M. & W. 461, 463.)

Where it does not appear that the debt is payable on a particular day, as on the claim in an indebitatus count, the precedents warrant a plea of the defendant's continual readiness and willingness to pay, and of an actual tender and refusal before action; and if the plaintiff relies on the debt being payable on a particular day and the tender not being made in time, he must reply such facts specially. (*Smith* v. *Manners,* 28 L. J. C. P. 220; 5 C. B. N. S. 632.)

Tender of a smaller sum cannot be made in respect of a single entire debt of a larger amount, the creditor not being bound to accept less than his whole demand (*Dixon* v. *Clark,* 5 C. B. 365); and the debtor is not entitled to apply a set-off in reduction of the amount due, so as to make a tender of the residue sufficient. (*Searles* v. *Sadgrove,* 25 L. J. Q. B. 12; 5 E. & B. 639; *Phillpotts* v. *Clifton,* 10 W. R. Ex. 135.) Consequently a plea of tender pleaded to part of an entire cause of action is bad in substance, if the objection appears on the record. Where the declaration is general and is not framed on a single entire cause of action, as in the indebitatus counts, a plea of tender as to part may be pleaded, as the tender might have been made in respect of a single entire cause of action. (*Jones* v. *Owen,* 5 A. & E. 222; *Hesketh* v. *Fawcett,* 11 M. & W. 356.) And a plea of tender may be pleaded to part of the claim under several indebitatus counts, and will be applied according to the evidence. (*Robinson* v. *Ward,* 8 Q. B. 920.) In such cases the plaintiff may reply that the sum tendered was in respect of a larger sum due on a single entire cause of action. (Ib.; *Tyler* v. *Bland,* 9 M. & W. 338; *Dixon* v. *Clark,* 5 C. B. 365; *Cotton* v. *Godwin,* 7 M. & W. 147; *Searles* v. *Sadgrove,* 25 L. J. Q. B. 15; 5 E. & B. 639.) It is not sufficient for such replication to show that the sum tendered was part of a larger amount due, without showing that it was due in respect of a single entire cause of action. (*Hesketh* v. *Fawcett,* 11 M. & W. 356; *Brandon* v. *Newington,* 3 Q. B. 915.) When a person has separate demands for unequal sums against several persons, a tender of one sum for the debts of all will not support a plea that a certain sum was tendered for the debt of one. (*Strong* v. *Harvey,* 3 Bing. 304.) A tender of the debt alone may be made after a demand from the creditor's attorney, without the costs of the attorney's letter. (*Kirton* v. *Braithwaite,* 1 M. & W. 310.)

Tender to or by one of several joint creditors or joint debtors is a valid tender. (See *ante,* "*Payment,*" p. 560; *Douglas* v. *Patrick,* 3 T. R. 683.) Tender may be effectually made to any one authorized to receive payment of the debt. (*Goodland* v. *Blewett,* 1 Camp. 477; *Kiston* v. *Braithwaite,* 1 M. & W. 310.) And it may be made by an agent of the debtor. (*Read* v. *Golding,* 2 M. & S. 86.)

Tender cannot be pleaded to a claim for unliquidated damages. (*Dearle*

to the residue of the claim in the same manner as where money is paid into court to part. See ante, p. 563.]

Replication traversing the Tender (*a*).

That the defendant did not tender and offer to pay to the plaintiff the said £—— as alleged.

Replication that a larger Sum was due in respect of an entire Cause of Action.

That at the time of the alleged tender a larger sum than the said £—— was due from the defendant to the plaintiff as one entire sum and on one entire contract, being [parcel of] the money claimed in the declaration and in respect of which the defendant made the said tender.

Like replications: Cotton v. *Godwin*, 7 M. & W. 147; *Hesketh*

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v. *Barrett*, 2 A. & E. 82.) It is admissible, by statute, in some actions to recover damages for wrongs. (See *post*, "*Tender*," c. 6.)

The plea of tender must be accompanied by a payment of the amount into court, which is also stated in the plea. Without such payment into court the plaintiff might sign judgment for the amount to which the tender is pleaded. (*Chapman* v. *Hicks*, 2 C. & M. 633.) The plea carries with it all the effects of a plea of payment into court as an admission on the record. (See *ante*, "*Payment into Court*," p. 563.)

The plaintiff may take the money out of court whether he confesses or denies the plea of tender. (*Le Grew* v. *Cooke*, 1 B. & P. 333.) The sum taken out of court under a plea of tender is held not to be recovered in the action, so that if the plaintiff recovers less than £20 besides the sum so taken out, he is not entitled to have his costs taxed on the higher scale. (*James* v. *Vane*, 29 L. J. Q. B. 169; overruling *Cooch* v. *Maltby*, 23 L. J. Q. B. 305; and see *Dixon* v. *Walker*, 7 M. & W. 214; *Chambers* v. *Wiles*, 24 L. J. Q. B. 267; *Beard* v. *Perry*, 31 L. J. Q. B. 30.)

If the defendant is successful on the issue raised on the plea of tender, he is entitled to judgment for the costs of the action; but if, as is frequently the case, there is any doubt as to the sufficiency of the tender, it is safer to plead payment into court, because if the defendant fails on the issue raised on a plea of tender he has to pay all the costs of the action, whereas under the plea of payment into court he only pays the costs up to the time of taking the money out of court. (r. 12, H. T. 1853.)

The defendant will not be allowed to plead tender together with any other plea to the same cause of action. (*Maclellan* v. *Howard*, 4 T. R. 194; *Orgill* v. *Kemshead*, 4 Taunt. 459; and see "*Payment into Court*," *ante*, p. 564.)

(*a*) The plaintiff might also traverse the continual readiness and willingness of the defendant to pay. A replication taking issue on the plea would put in issue both the readiness and willingness, and also the tender. It is sometimes replied specially that the plaintiff demanded the sum before or after the tender, and the defendant refused to pay it (1 Wms. Saund. 33 *c*); but such replications seem to be unnecessary, as the demand and refusal in such cases show that the defendant was not always ready and willing to pay. (*Johnson* v. *Clay*, 7 Taunt. 486; *Poole* v. *Tumbridge*, 2 M. & W. 223, 226.) If the plaintiff admits the truth and sufficiency of the plea he should enter a *nolle pros.* to so much of his claim as it is pleaded to. (See *ante*, p. 556.)

v. *Fawcett*, 11 M. & W. 356; *Brandon* v. *Newington*, 3 Q. B. 915; *Dixon* v. *Clark*, 5 C. B. 366; *Searles* v. *Sadgrove*, 5 E. & B. 639; 25 L. J. Q. B. 15; *Holden* v. *Ballantyne*, 29 L. J. Q. B. 148.

TRUCK ACT. See "*Illegality*," *ante*, p. 514.

WAGER. See "*Gaming*," *ante*, p. 503.

WAIVER.

See "*Bills of Exchange*," *ante*, p. 458; "*Rescission of Contract*," *ante*, p. 568.

WARRANTY.

General Issue (*a*).

"Non Assumpsit," *ante*, p. 401.

Plea denying the Warranty.

That he did not warrant as alleged. [*It would be unobjectionable to use* did not promise, *or any other appropriate denial:* C. L. P. Act, 1852, Sched. B. 37; *and see ante*, p. 231, n. (*a*).]

(*a*) In an action upon a warranty framed in contract, as in the form, *ante*, p. 231, the plea of *non assumpsit*, or a plea traversing the contract alleged in the declaration, will operate as a denial of the fact of the sale and warranty having been given, but not of the breach (r. 6, T. T. 1853); therefore in an action on contract for breach of warranty the breach, if denied, must be specifically traversed. (*Smith* v. *Parsons*, 8 C. & P. 199.)

If the form of declaration given by the C. L. P. Act, 1852, sch. B. 21, is treated as a count in tort, which it may be, see *ante*, p. 23, n. (*a*), and not guilty is pleaded to it, that plea will deny both the warranty and the breach (Ib.).

In an action for the price on the sale of a specific chattel with a warranty, a breach of the warranty forms no defence; but the purchaser may give evidence of the real value of the article in reduction of damages. (See *ante*, "*Warranty*," p. 231.)

In an action on a sale of unascertained goods by a warranted description for not accepting, the defendant may plead that the plaintiff was not ready and willing to deliver goods answering to the contract. (*Ante*, pp. 232, 571.) To a special count for the price he might plead that the plaintiff did not deliver such goods; and if the purchaser has accepted the goods, and is sued for the price under an indebitatus count, he may show the actual value of the goods in reduction of damages. (*Ante*, p. 232.)

Plea traversing the Breach of Warranty.

That at the time of the alleged warranty the said horse [*or as the case may be*] was sound.

Work.

General Issue (*a*).

"Never indebted," *ante*, p. 397; "Non assumpsit," *ante*, p. 401; "Non est factum," *ante*, p. 403.

(*a*) As to the effect of the general issue, never indebted, to the indebitatus count for work, see *ante*, p. 400 n. The general issue to the special counts given *ante*, p. 235, is *non est factum* or *non assumpsit*, according to the form of the contract. The effect is to deny the contract alleged; see *ante*, p. 401 (*a*); 403 (*a*). The performance of conditions precedent must be denied specifically. The breach alleged must be traversed in terms.

CHAPTER VI.

PLEAS AND SUBSEQUENT PLEADINGS IN ACTIONS FOR WRONGS.

The General Issue (*a*).

Plea of the General Issue, Not Guilty. (*C. L. P. Act*, 1852, *Sched. B.* 43.)

That he is not guilty.

(*a*) *The general issue.*]—See the observations on the plea of the general issue in actions on contracts, *ante*, p. 396.

The most common form of the general issue in actions for wrongs is the above plea of *not guilty*. In actions for detaining the plaintiff's goods, the form of plea is that the defendant does not detain, *non detinet*, or did not detain the goods. (See *post*, "*Detention*," p. 616.) In actions of replevin the form is that he did not take, *non cepit*. (See *post*, "*Replevin*.")

It is sometimes doubtful whether a count is framed upon a contract or for a wrong, and consequently whether the general issue appropriate to the former or the latter form of action should be used. Such cases are provided for by the C. L. P. Act, 1852, s. 74, which enacts that, "whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts, any plea which shall be good in substance, shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." In such doubtful cases therefore either form of general issue, *non assumpsit* or *not guilty*, may be pleaded without objection, but with a different result; as the latter denies the breach or wrongful act, and admits the contract or duty charged; the former denies the contract or duty, and admits the breach or wrongful act.

The following are the Rules of Pleading of T. T. 1853, which relate to the general issue in actions for wrongs:—

By r. 16, T. T. 1853, "In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

"*Exempli gratiâ.* In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

"In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

"In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of speaking the words, of speak-

Plea of Not Guilty by several Defendants.

That they are not, nor is either [*or* any] of them, guilty.

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ing them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

"In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

"In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received."

By r. 19, "In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially."

By r. 20, "In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein."

By r. 15, "In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea."

By r. 17, "All matters in confession and avoidance shall be pleaded specially, as in actions on contract."

The effect of the above rules may be stated generally to be, that the plea of the general issue is a denial of the wrongful act alleged only, and not of the facts stated in the inducement; that the inducement and all other traversable allegations which are not included in this denial are admitted, and must, if denied, be specifically traversed; and that all matters in confession and avoidance must be pleaded specially.

The term, "wrongful act," used above, means merely the act charged as the injury; and the plea denies the bare act only and not its wrongful quality under the particular circumstances, except where the act is expressed by a legal term necessarily involving its wrongfulness, as in the instances of an "assault," and of a "conversion" of goods, etc. (See *infra*.)

The "inducement" includes the statement of all facts necessary to the assertion of the right injured, and necessarily precedent to the injurious act. (*Wright* v. *Lainson*, 2 M. & W. 739, 744, 748; and see *ante*, p. 401.) It is generally placed first in the declaration; but the effect of the plea, in admitting all facts stated by way of inducement, is not altered by their position. (*Lewis* v. *Alcock*, 3 M. & W. 188; *Dunford* v. *Trattles*, 12 M. & W. 529; *Mitchell* v. *Crasweller*, 13 C. B. 237; *Torrence* v. *Gibbins*, 5 Q. B. 297; *Grew* v. *Hill*, 3 Ex. 801.)

"Matters in confession and avoidance" are those which consist of new facts showing either that the act was not wrongful by reason of some excuse or justification, or that, although it was wrongful, the cause of action has been satisfied or discharged by matter subsequent. (See *ante*, p. 376, *n.*)

In order to explain the scope of the general issue, the injury or wrongful act may be referred to three classes:—1. A simple act actionable in itself, independently of the mode of doing it and of its consequences. 2. An act not injurious in itself, but only as done in an injurious manner. 3. An act injurious only by reason of the consequences resulting from it.

Plea of not Guilty in an Action against Husband and Wife for a Tort committed by the Wife.

That the defendant *G.* [*the Christian-name of the Wife*] is not guilty.

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1. Where the act charged as injurious is a *simple act*, actionable in itself, independently of the mode of doing it or of its consequences, the plea denies only that the defendant did such act.

Thus in an action for a trespass to the person, as an assault, battery, or imprisonment (*ante*, p. 353), it denies merely that the defendant did any act amounting to the trespass charged. Under the issue raised by this plea, he may show that the act was done by the leave and licence of the plaintiff (*Christopherson* v. *Bare*, 11 Q. B. 473); or that it was merely touching the plaintiff for the purpose of calling his attention (*Coward* v. *Baddeley*, 28 L. J. Ex. 260; 4 H. & N. 478); which acts do not amount to trespasses. Or the defendant may prove that the alleged act was the result of accident or of some agency over which he had no control, so that it was not his act. (*Gibbons* v. *Pepper*, 1 L. Raym. 38; *Wakeman* v. *Robinson*, 1 Bing. 213; *Hall* v. *Fearnley*, 3 Q. B. 919.) But any defence which admits that the act was a trespass, and that it was the defendant's act, although unintentional or accidental, as that the plaintiff by his own negligence or otherwise made the defendant do it, or that it was justifiable, as by virtue of a *ca. sa.*, must be specially pleaded. (*Hall* v. *Fearnley*, *supra*; *Knapp* v. *Salsbury*, 2 Camp. 500.)

In actions for trespasses to land (*ante*, p. 358), the plea of not guilty denies that the defendant committed the act of alleged trespass in the place mentioned; but it admits the plaintiff's possession, or right of possession of that place, which is matter of inducement, and must, if denied, be traversed specifically (r. 19, T. T. 1853); and any defence which shows that the act was lawful, as the exercise of a right of way, must be specially pleaded.

In actions for trespasses to the plaintiff's goods, as by taking or damaging them (*ante*, p. 356), it denies that the defendant committed the act alleged (r. 20, T. T. 1853); it admits the plaintiff's property in the goods, which, if denied, must be specifically traversed; and any excuse or justification, as that the goods were taken under a *fi. fa.*, cannot be shown under the general issue, but must be pleaded specially.

But in the action for converting the plaintiff's goods, the conversion is held to mean an act necessarily wrongful, under the actual circumstances (see *ante*, p. 253), and the plea of not guilty puts in issue all the facts which show the act to be wrongful (*Whitmore* v. *Greene*, 13 M. & W. 104, 107; *Young* v. *Cooper*, 6 Ex. 259; overruling *Stancliffe* v. *Hardwick*, 2 C. M. & R. 1; and see *Ringham* v. *Clements*, 12 Q. B. 260); except the plaintiff's property in the goods (*Barton* v. *Brown*, 5 M. & W. 298), which is admitted by the plea. Under the general issue in this action the defendant may prove any facts justifying his act, which are not inconsistent with the plaintiff's admitted property in the goods, as that the goods were converted under a distress, or under a writ of *fi. fa.*; and such defence should not be specially pleaded. (See *Unwin* v. *St. Quintin*, 11 M. & W. 277, 286.)

In actions for detaining the plaintiff's goods (*ante*, p. 271), the plea of *non detinet* denies the detention of the goods by the defendant, which means a detention adverse to or against the will of the plaintiff, but does not involve any circumstances tending to show that it is wrongful. (*Clements* v. *Flight*, 16 M. & W. 42; and see *Mason* v. *Farnell*, 12 M. & W. 674; *Whitehead* v. *Harrison*, 6 Q. B. 423, 429.) No other defence than such denial is admissible under this plea; and it admits the plaintiff's property in the goods (r. 15, T. T. 1853).

In actions of replevin (*ante*, p. 337), the plea of *non cepit* puts in issue the taking of the cattle or goods, and the taking in the place alleged.

In actions for obstructing a right of way, or disturbing a right of common, or diverting a watercourse, or obstructing lights, not guilty denies the obstruction, disturbance or diversion only, and no matters of excuse or justification can be shown under this plea. (*Frankum* v. *Lord Falmouth*, 2 A. & E. 452.) It admits the plaintiff's right and his possession of the tenements to which the right is appurtenant.

In an action for infringing a copyright or a patent, the plea of not guilty denies the act of infringement only. (*Stead* v. *Anderson*, 4 C. B. 806; *Gambart* v. *Sumner*, 29 L. J. Ex. 98; 5 H. & N. 5.) In an action for infringing a copyright, it admits the plaintiff's subsisting copyright and all the circumstances necessary to support it. In an action for the infringement of a patent, it admits that the invention was new, that the plaintiff was the inventor, the grant of the letters-patent, and the sufficiency of the letters-patent and of the specification.

In an action for the loss or damage to goods by a carrier, it denies the loss or damage only and admits the receipt of the goods by the defendant as a carrier, and the terms and purpose of the bailment. (r. 16, T. T. 1853; and see *Webb* v. *Page*, 6 M. & G. 196.)

2. Where the act is not in itself injurious, but becomes so only by the *mode* of doing it, the plea of not guilty denies both the act and the mode of doing it.

Thus in actions for defamation (*ante*, p. 262) it puts in issue the publication of the words maliciously and with a defamatory meaning (*Parmiter* v. *Coupland*, 6 M. & W. 105; *Baylis* v. *Lawrence*, 11 A. & E. 920); but the malice of the defendant (except in the case of a privileged occasion) is conclusively presumed in law from the matter published being defamatory and false. (*Bromage* v. *Prosser*, 4 B. & C. 254; *Haire* v. *Wilson*, 9 B. & C. 643; *Fisher* v. *Clement*, 10 B. & C. 475.) It admits that the defamatory matter is false; and the truth, if relied on as a defence, cannot be given in evidence under this plea, but must be pleaded specially. (*Underwood* v. *Parks*, 2 Str. 1200; *Smith* v. *Richardson*, Willes, 20; 1 Wms. Saund. 130, n. (1).) In an action for slander of the plaintiff in his office, profession or trade (*ante*, p. 268), it denies the speaking of the words, the speaking of them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, profession or trade; but it admits the fact of the plaintiff holding the office or being of the profession or trade alleged (r. 16, T. T. 1853). In actions for words which are innocent in their ordinary meaning, but are charged as having been used in a peculiar defamatory sense, the plea of not guilty to a declaration in the form in use since the C. L. P. Act, 1852 (*ante*, p. 262), denies the innuendo or meaning imputed to the words.

Under the general issue in actions for defamation, the defendant may rely on the writing or speaking of the words having been on a privileged occasion, so as not to constitute an actionable publication. (*Ante*, p. 262; 1 Wms. Saund. 130 (*d*); *Lillie* v. *Price*, 5 A. & E. 645; *Hoare* v. *Silverlock*, 9 C. B. 20; *Earl Lucan* v. *Smith*, 1 H. & N. 481; 26 L. J. Ex. 94.) But the plaintiff may in such case show that the publication was not within the privilege, by proving actual malice in the defendant (*Taylor* v. *Hawkins*, 16 Q. B. 308); for which purpose he may prove that the charge was false to the knowledge of the defendant. (*Fountain* v. *Boodle*, 3 Q. B. 5.)

In actions for maliciously and without probable cause prosecuting legal proceedings against the plaintiff (*ante*, p. 303), the plea of not guilty denies the prosecution of the proceedings, the absence of probable cause, and the malice. (*Mitchell* v. *Jenkins*, 5 B. & Ad. 588; *Cotton* v. *Browne*, 3 A. & E. 312; *Hounsfield* v. *Drury*, 11 A. & E. 98.) It admits the allegation of the termination of the proceedings, which, if intended to be denied, must be traversed separately. (*Watkins* v. *Lee*, 5 M. & W. 270; *Atkinson* v. *Raleigh*, 3 Q. B. 79; *Haddrick* v. *Heslop*, 12 Q. B. 267.)

3. Where the act becomes injurious only by reason of the *consequences* resulting from it, or from the consequences resulting from the mode of doing the act, the plea of not guilty denies both the act and its consequences, or the act and the mode of doing it and its consequences.

Thus in actions for slander, in respect of words not actionable in themselves, but only by reason of special damage caused by them (*ante*, p. 270), it puts in issue the speaking of the words, the speaking of them maliciously and in the defamatory sense imputed, and the special damage alleged to have been caused thereby. (*Wilby* v. *Elston*, 8 C. B. 142.) In such actions the plaintiff cannot prove general damage beyond the special damage laid. (*Dixon* v. *Smith*, 29 L. J. Ex. 125; 5 H. & N. 450; *ante*, p. 266.)

In actions for fraud (*ante*, p. 289), it denies that the defendant made the representation charged, that it was false, that he made it knowing it to be false or at least without a belief of its truth, that he made it with the intent to induce the plaintiff to act upon it, that the plaintiff did act upon it, and that he sustained the alleged damage in consequence. (*Mummery* v. *Paul*, 1 C. B. 316; *Rawlings* v. *Bell*, 1 C. B. 951; *Freeman* v. *Cooke*, 2 Ex. 654; *Cornish* v. *Abington*, 28 L. J. Ex. 262; 4 H. & N. 549; *Eastwood* v. *Bain*, 28 L. J. Ex. 74; 3 H. & N. 738.) So in an action for fraud in selling a business by a false representation as to its value, it denies that the defendant made the representation, that it was false, that he knew it to be so, and the sale by reason of it. (*Mummery* v. *Paul*, *supra*.) So in an action for the sale of a horse by a false warranty, it would seem to deny the warranty, the unsoundness, and the sale; but it is reported to have been held in one case, where the sale seems to have been stated by way of inducement, that it was not put in issue by this plea. (*Spenser* v. *Dawson*, 1 M. & Rob. 552.)

In actions for an injury caused to the plaintiff by the defendant's negligently doing an act (*ante*, p. 317), the plea of not guilty denies that the defendant did the act, that he did it negligently, that the alleged damage happened, and that it was caused by the negligence. Under this issue the defendant may show that the plaintiff caused the damage by his own want of care, so that it was not attributable to the act of the defendant. (See *post*, "*Negligence.*")

In cases of negligence resulting in acts of trespass, as in collisions, if the declaration charges the injury as a direct trespass (*ante*, p. 318 (*a*)) and not as the consequence of the negligence of the defendant, the plea of not guilty denies the mere act alleged; and any defence admitting the act to be that of the defendant, as that it was caused by the plaintiff's negligence, must be specially pleaded. (*Knapp* v. *Salsbury*, 2 Camp. 500; *Hall* v. *Fearnley*, 3 Q. B. 919; *McLaughlin* v. *Pryor*, 4 M. & G. 48.)

In actions for collisions arising from negligent driving, where the declaration states by way of inducement that the defendant was possessed of a carriage, or that a carriage was under his management or that of his servant at the time of the injury, these facts are admitted by the plea of not guilty. (*Taverner* v. *Little*, 5 Bing. N. C. 678; *Hart* v. *Crowley*, 12 A. & E. 378; *Dunford* v. *Trattles*, 12 M. & W. 530.) But in a declaration charging that the defendant by his servant negligently drove a cart and horse and injured the plaintiff, an allegation by way of inducement "that the defendant was possessed of a cart and horse, which was being driven by his servant," without stating "at the time of the grievance complained of," was held an immaterial allegation and not traversable, and therefore not admitted, and the defendant was allowed to show under the plea of not guilty that the driver was not his servant. (*Mitchell* v. *Crassweller*, 13 C. B. 237.)

In actions by a master for damage done to him in respect of his servant, as for loss of service occasioned by enticing away his servant or seducing his female servant (*ante*, p. 311), the plea of not guilty denies the act of enticing or seduction alleged, and also the damage sustained by the master

in consequence, and actual damage or loss of service must be proved in order to sustain the action. (*Grinnell* v. *Wells*, 7 M. & G. 1033; *Eager* v. *Grimwood*, 1 Ex. 61; *Davies* v. *Williams*, 10 Q. B. 725.) In actions for enticing away or harbouring the plaintiff's servant it also denies that the defendant knew of the service. (*Fores* v. *Wilson*, Peake, 55.) The allegations of the service and similar allegations are admitted by the plea of not guilty. Where the declaration contains an inducement that *G. H.* was the servant of the plaintiff, and then charges that the defendant beat or seduced *G. H.* (as in the form *ante*, p. 311), or that the defendant beat or seduced *G. H.*, then being the servant of the plaintiff, the plea of not guilty denies the act done to *G. H.* only, and admits that *G. H.* was the servant of the plaintiff (*Torrence* v. *Gibbins*, 5 Q. B. 297); and even where the declaration contains no formal inducement, but charges merely that the defendant beat or seduced the plaintiff's servant, without naming or identifying the person (as in the form given for the action for criminal conversation in the C. L. P. Act, 1852, Sched. B. 27), it seems that it is not necessary for the plaintiff to prove the relationship of servant (*Kenrick* v. *Horder*, 7 E. & B. 628); but it has been said that in this case some proof of the identity of the servant must be given. (Per Crompton, J., *Ib.* 631; and see *Forman* v. *Dawes*, C. & Mar. 127; but see *Dunford* v. *Trattles*, 12 M. & W. 529.)

In actions against a master for an injury done by his servant (*ante*, p 313), the plea of not guilty denies the act of the servant; and where a particular person is referred to in the declaration, by way of inducement, as being the servant, this is admitted by the plea (*Hart* v. *Crowley*, 12 A. & E. 378); but if the declaration alleges directly that the defendant did the act or that the defendant by his servant without naming or identifying him did the act, the general issue denies that the person who in fact did the act was the servant of the defendant, so as to render the latter responsible. (*Mitchell* v. *Crassweller*, 13 C. B. 237.)

In actions by a servant against his master for negligently providing unsafe materials and implements for the work (*ante*, p. 314), it puts in issue the dangerous character of the materials or implements, also the knowledge of the master and the ignorance of the plaintiff of these circumstances, and that the damage to the plaintiff was occasioned thereby. (See the cases cited *ante*, p. 314.) In actions by a servant against his master for negligently employing an incompetent fellow-servant, it denies the employment and incompetency of the fellow-servant, the damage caused to the plaintiff by his incompetency, and the negligence of the defendant in employing him. (See *Tarrant* v. *Webb*, 18 C. B. 797; 25 L. J. C. P. 261.)

In actions against the sheriff for negligence or default of duty (*ante*, p. 341), the plea of not guilty denies the neglect or default alleged. In an action for a false return, it denies that he made the alleged return. In an action for an escape it denies the escape (r. 16, T. T. 1853; and see *post*, "*Sheriff*"), and except in actions for negligence or default of duty in the execution of final process against the person, it denies any actual damage as well as the act of default or neglect as causing such damage; for in these cases the action cannot be sustained without proof of actual damage resulting from the neglect or default. (*Wylie* v. *Birch*, 4 Q. B. 566; *Bales* v. *Wingfield*, ib. 580, n.; *Williams* v. *Mostyn*, 4 M. & W. 145.) In actions for default in arresting or for an escape on final process, it denies the default only; and the plaintiff is entitled to recover nominal damages at least, although no actual damage is proved. (See *ante*, p. 341, 345.) Under this issue the defendant may show that the bailiff guilty of the default was specially appointed by the plaintiff (*Ford* v. *Leche*, 6 A. & E. 699); but he cannot show an authority from the plaintiff not to execute the writ. (*Howden* v. *Standish*, 6 C. B. 504.) He may show that he discharged the prisoner under an order of protection from the Insolvent Court. (*Wallinger* v. *Gurney*, 31 L. J. C. P. 55.) The plea admits all the preliminary proceed-

ings stated as matters of inducement (r. 16, T. T. 1853). Thus in an action for not levying under a *fi. fa.* it admits the judgment, the writ, the indorsement, the delivery to the sheriff, that goods were in possession of the debtor, and that the defendant was sheriff, and denies only the default in levying. In an action for making a false return to a writ of *fi. fa.* it admits all the matters above mentioned, and also that the defendant levied the money, if stated in the declaration. (*Wright* v. *Lainson*, 2 M. & W. 739; *Lewis* v. *Alcock*, 3 M. & W. 188; *Rowe* v. *Ames*, 6 M. & W. 747.) In an action for an escape it admits the debt, judgment, and all the preliminary proceedings (r. 16, T. T. 1853).

In actions for damage caused by the defendant carrying on a trade or doing an act so as to be a nuisance, the plea of not guilty denies that the defendant carried on the trade, or did the act in such a way as to be a nuisance, and that the plaintiff suffered the alleged damage from it (r. 16, T. T. 1853). The case of *Hole* v. *Barlow*, 4 C. B. N. S. 434; 27 L. J. C. P. 207, which held that under this issue the defendant might show that the trade was necessary and carried on in a proper and convenient place, and in a proper and reasonable manner, has been overruled in the Exchequer Chamber. (*Bamford* v. *Turnley*, 10 W. R. 803; and see *Stockport Waterworks Co.* v. *Potter*, 31 L. J. Ex. 9.) In an action for constructing a cesspool near a well, and thereby contaminating the water of the well, it denies both the fact of the construction of the cesspool and that the water was thereby contaminated. (*Norton* v. *Scholefield*, 9 M. & W. 665.) Under this issue the defendant cannot assert a right to make the alleged nuisance, as by an user for twenty years, but must plead it specially. (*Flight* v. *Thomas*, 10 A. & E. 590.)

In an action by a reversioner for an injury done to his reversion to land demised to a tenant (*ante*, p. 338), it denies the injurious act of the defendant, and that damage was thereby caused to the reversion. (*Young* v. *Spencer*, 10 B. & C. 145; *Kidgill* v. *Moor*, 9 C. B. 365.) It admits the demise, the tenancy, and the reversionary interest of the plaintiff. (*Raine* v. *Alderson*, 4 Bing. N. C. 702; *Grenfell* v. *Edgcome*, 7 Q. B. 661.) In an action for waste by non-repair, it puts in issue only the want of repair, and not the wrongfulness of it. (*Bacon* v. *Smith*, 1 Q. B. 345, 346.)

In an action by the owner of a reversionary interest in goods let to hire to a third person (*ante*, p. 340), it denies any actual damage to the goods, which must be proved in order to sustain the action (*Tancred* v. *Allgood*, 28 L. J. Ex. 362; 4 H. & N. 438); but it admits the alleged reversionary interest of the plaintiff.

In actions for knowingly keeping a mischievous animal, which injured the plaintiff (*ante*, p. 316), the plea of not guilty denies that the defendant kept the animal, that the animal was mischievous, that the defendant knew it to be so, and that it did the injury. (*Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 C. B. 622.) Under this issue the plaintiff is not required to prove negligence on the part of the defendant in keeping the mischievous animal, it being sufficient to prove that he kept it with a knowledge that it was mischievous. (*May* v. *Burdett*, 9 Q. B. 101.) It is said that the fact that the plaintiff brought the injury on himself by wilfully going within reach of the animal after warning of its mischievous nature, must, if a defence, be specially pleaded. (*May* v. *Burdett*, 9 Q. B. 101, 113; and see *Fleming* v. *Orr*, 2 Macq. H. L. Cases, 14.)

In an action against a witness for not attending a trial upon a subpœna (*ante*, p. 370), it denies the neglect of the defendant and the damage to the plaintiff arising therefrom. Actual damage is essential to the action, but a loss of the costs on some of the issues is sufficient, although the plaintiff had not a good cause of action. (*Couling* v. *Coxe*, 6 C. B. 703; and see *Needham* v. *Fraser*, 1 C. B. 815; *Yeatman* v. *Dempsey*, 7 C. B. N. S. 628; 29 L. J. C. P. 177.) In such actions, the plea of the general issue admits

Plea of the General Issue by Statute (a).

By statute [*state also in the margin of the plea the year of the reign or years of the session in which the Act*] That he is not guilty [*or, if there are several defendants,* that they are not, nor is either *or* any of them, guilty].

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the allegations that the plaintiff had a good cause of action, and that the evidence of the defendant was material. (*Needham* v. *Fraser*, *supra*.)

The effect of the plea of the general issue will be found stated more fully under the various titles throughout the following precedents of pleas.

(*a*) *The general issue by statute.*]—By certain statutes defendants are privileged to plead the general issue and to set up in evidence under that plea special defences which would otherwise require to be pleaded.

Thus by the 21 Jac. I. c. 4, s. 4, it is enacted that if any information, suit, or action, shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on behalf of the king or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty or that they owe nothing (see *ante*, p. 398), and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been a good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action; and the said matters shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth or alleged the same matter in bar or discharge of such information, suit or action.

This enactment applies to subsequent statutes giving penal actions, as the 11 Geo. II. c. 19, s. 4, for the double value of goods fraudulently removed by a tenant (*Jones* v. *Williams*, 4 M. & W. 375); the 22 Geo. II. c. 46, s. 14, giving a penal action against a deputy clerk of the peace for practising as an attorney. (*Faulkner* v. *Chevell*, 5 A. & E. 213.) It applies both to actions given to informers, and to actions for penalties given to the *party grieved*. (See *Fife* v. *Bousfield*, 6 Q. B. 100, *ante* p. 202.)

By the effect of the 7 Jac. I. c. 5, and the 21 Jac. I. c. 12, s. 5, if any action upon the case trespass, battery, or false imprisonment shall be brought against any justice of the peace, mayor, or bailiff of city or town corporate, constable, churchwardens, or overseer of the poor and their deputies, or any other which in their aid and assistance or by their commandment shall do anything touching or concerning his or their office or offices for or concerning any matter, cause, or thing by them done by virtue or reason of their or any of their office or offices, it shall be lawful for all and every person and persons aforesaid to plead thereunto the general issue that he or they are not guilty, and to give such special matter in evidence to the jury which shall try the same, which special matter being pleaded had been a good and sufficient matter in law to have discharged the said defendant or defendants of the trespass or other matter laid to his or their charge.

By the 42 Geo. III. c. 85, s. 6, the above provisions of the Act 21 Jac. I. are extended "to all persons having, holding, or exercising, or being employed in, any public employment, or any office, station or capacity, either civil or military, either in or out of this kingdom, and who, under and by virtue, or in pursuance of any Act or Acts of Parliament, law or laws, or lawful authority within this kingdom, or any Act or Acts, law or laws, or lawful authority in any colony, or foreign possession of his Majesty, have, by virtue of any such public employment, or such office, station, or capacity, power or authority to commit persons to safe custody; and all such persons

or Acts of Parliament relied upon was or were passed, and the chapter and section of each of such Acts, and also specify whether they are public Acts or otherwise, as in the form given under the title "Distress," post, p. 617.]

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having such power or authority as aforesaid, shall have and be entitled to all the privileges, benefits, and advantages given by the provisions of the said Act, as fully and effectually to all intents and purposes as if they had been specially named therein."

By the 11 & 12 Vict. c. 44, s. 17, so much of the above Acts as relates to actions against justices of the peace was repealed, and by s. 10 it was enacted "that in every action against any justice of the peace for anything done by him in the execution of his office, the defendant shall be allowed to plead the general issue, and to give any special matter of defence, excuse or justification in evidence under such plea, at the trial of such action. (See "*Justice of Peace*," *ante*, p. 300.)

By the various statutes regulating the metropolitan police, the rural police, the police of towns, and special constables (see Chitty's Statutes), in any action brought against any person for anything done in pursuance of any of those acts, the defendant may plead the general issue and give the special matter in evidence at the trial. (See "*Police*," *ante*, p. 334.) So also in actions against revenue officers by 8 & 9 Vict. c. 87, s. 121.

By the 13 & 14 Vict. c. 61, s. 19, in any action brought against the bailiff of a county court, or any person acting by his order and in his aid for anything done in obedience to any warrant of the court, the defendant may plead the general issue and give the special matter in evidence at the trial. (*Davies* v. *Fletcher*, 2 E. & B. 271.) This enactment extends to clerks of county courts. (*Dews* v. *Riley*, 11 C. B. 434.)

By the 24 & 25 Vict. c. 96 (consolidating the statute law relating to larceny), s. 113, by the 24 & 25 Vict. c. 97 (consolidating the statute law relating to malicious injuries to property), s. 71, and by the 24 & 25 Vict. c. 99 (consolidating the statute law against offences relating to the coin), s. 33, in any action against any person for anything done in pursuance of any of those Acts, the defendant may plead the general issue, and give those Acts and the special matter in evidence at any trial to be had thereupon.

By the 5 & 6 Will. IV. c. 50, s. 109 (relating to highways in general), "in actions for anything done in pursuance of or under the authority of that Act, the defendant may plead the general issue and give that Act and every special matter in evidence." This Act is to be construed as one with the Act for the better management of highways, 25 & 26 Vict. c. 61.

By 11 & 12 Vict. c. 63, s. 139 (the Public Health Act), in actions for anything done under that Act by or under the direction of a local board of health, the defendant may plead the general issue and give that Act and all special matter in evidence thereunder. (See "*Public Health*," *ante*, p. 336.) So also in actions for anything done under the Metropolitan Local Management Acts, 25 & 26 Vict. c. 102, s. 106.

By the 11 Geo. II. c. 19, s. 21, in all actions of trespass or upon the case brought against any person entitled to rents or services of any kind, or his bailiff or receiver or other person relating to any entry by virtue of that Act or otherwise upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods thereupon, it shall be lawful for the defendant in such actions to plead the general issue and give the special matter in evidence. (See *post*, "*Distress*," p. 617.)

Formerly a like privilege of pleading the general issue and giving special defences in evidence under it was conferred by a great variety of Acts, public local and personal, and local and personal; but by the 5 & 6 Vict.

c. 97, s. 3, it is enacted that so much of any clause or provision in any Act or Acts commonly called public local and personal, or local and personal, or in any Act or Acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed. This statute does not apply to local and personal Acts passed subsequently to its date. (*Bowden* v. *Smith*, 18 L. J. C. P. 120.) As to what statutes come within this description, see Ib.; *Cock* v. *Gent*, 12 M. & W. 234; *Richards* v. *Easto*, 15 M. & W. 244; *Moore* v. *Shepherd*, 10 Ex. 424; *Carr* v. *Royal Exchange Assurance*, 31 L. J. Q. B. 93.

A person is considered as acting under or by virtue of or in pursuance of a statute, or in exercise of an office so as to be entitled to the privilege of pleading the general issue by statute, where he has a *bonâ fide* belief that he is so acting, and notwithstanding that he may not be justified in such belief upon reasonable grounds. (*Booth* v. *Clive*, 10 C. B. 827; *Read* v. *Coker*, 13 C. B. 850; *Jones* v. *Howell*, 29 L. J. Ex. 19; *Norwood* v. *Pitt*, 29 L. J. Ex. 127; and see *post*, "*Notice of Action*," p. 640.)

By r. 21, T. T. 1853, "In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words 'by statute,' together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue and of the nisi prius record."

Under this rule all the statutes under which the defence arises must be inserted in the margin, or the defendant will not be able to avail himself of them. (*Edwards* v. *Hodges*, 15 C. B. 477.) If one or more of the statutes are omitted from the margin, their insertion is an amendment which may be allowed under the C. L. P. Act, 1852, s. 222. (Ib.) Where a section of a statute omitted in the margin was relied on at the trial without amendment and without objection, it was held that on a question reserved for the court the plea might be treated as if the omitted section had been specified. (*Burridge* v. *Nicholetts*, 30 L. J. Ex. 145.)

The plea of the general issue by statute is not affected by the rules of pleading which have restricted the plea of the general issue at common law, consequently all the defences which were admissible under the general issue at common law, in addition to all the special matters arising under the statute, may be relied on under this plea; and no special pleas of such defences will, in general, be allowed to be pleaded together with the plea of the general issue by statute. (*Ross* v. *Clifton*, 11 A. & E. 631; *Maund* v. *Monmouth Canal Co.*, C. & M. 606, 608; *Fisher* v. *Thames Junction Ry. Co.*, 5 Dowl. 773; but see *Langford* v. *Woods*, 7 M. & G. 625.)

In actions for illegal and irregular distresses for rent (*ante*, p. 190), this plea puts in issue all matters of inducement, as the tenancy and the distress, as well as the irregularities complained of, and admits proof of all matters of justification. (*Williams* v. *Jones*, 11 A. & E. 643.) In actions for trespasses to land, or for the taking, conversion or detention of goods, the general issue by statute enables the defendant to prove a justification under a right of distress; and every justification at common law or by statute arising out of the distress may be given in evidence, and need not be pleaded specially. (*Eagleton* v. *Gutteridge*, 11 M. & W. 465.)

A plea of a justification under a statute in the general terms, that the acts complained of were done by the defendants under the powers given them by a particular Act of Parliament, was held good on demurrer, although the defendants had no privilege of pleading the general issue by statute,

Abatement.

Plea of the Non-joinder of a Co-Plaintiff (a).

[*Commence with the form, ante, p.* 387.] That at the time of the alleged trespass [*or* conversion, *or* detention] (if any) the plaintiff was not possessed of or interested in the said close [*or* goods] except jointly and undividedly with *J. K.*, who is still living. [*Concludé as ante, p.* 387.]

Plea of the coverture of the plaintiff or defendant: see forms, ante, "Abatement," p. 408; *Milner* v. *Milnes*, 3 T. R. 627; *and see Morgan* v. *Cubitt*, 3 Ex. 612; *"Husband and Wife," ante*, p. 294.

Accord and Satisfaction.

Plea of Accord and Satisfaction.

That he delivered to the plaintiff, and the plaintiff accepted and received from him, the sum of £—— [*or* certain goods, *or as the case may be*] in full satisfaction and discharge of the causes of action in the declaration mentioned. [*See pleas of accord and satisfaction in actions on contracts, ante, p.* 412.]

Plea, by several defendants sued as co-trespassers, of accord and satisfaction made by one of them: Bainbridge v. *Lax*, 9 Q. B. 819.

(*Beaver* v. *Mayor of Manchester*, 8 E. & B. 44; 26 L. J. Q. B. 311; and see such a plea, *Brine* v. *Great Western Ry. Co.*, 31 L. J. Q. B. 101.)

(*a*) *The misjoinder or non-joinder of parties to actions for wrongs.*]—In actions for wrongs independent of contract, the misjoinder and non-joinder of parties is not of so much importance as in actions on contracts. (As to which, see *ante*, p. 404.)

The *misjoinder of a plaintiff* (except in cases falling within the C. L. P. Act, 1860, s. 19, cited *ante*, "*Abatement*," p. 405) would be ground of non-suit or entitle the defendant to a verdict, unless amended.

The *non-joinder of a co-plaintiff* may be objected to by a plea in abatement, or, since the C. L. P. Act, 1852, by a notice under s. 35, but not otherwise. (*Addison* v. *Overend*, 6 T. R. 766; *Broadbent* v. *Ledward*, 11 A. & E. 209; *Phillips* v. *Claggett*, 10 M. & W. 102.) If the defendant does not avail himself of this objection in either of these modes, he will still only be liable for such portion of the damages as was incurred by the plaintiff alone. (*Sedgworth* v. *Overend*, 7 T. R. 279; *Bloxam* v. *Hubbard*, 5 East, 407.) The powers of amendment provided in sects. 34, 35, and 36 of the C. L. P. Act, 1852, already cited (*ante*, p. 405), apply to these cases. As to what parties may sue jointly for wrongs, see *Coryton* v. *Lithebye*, 2 Wms. Saund. 115; *and notes*, ib. The assignee of a separate part of a patent may sue alone for an infringement of that part, and a plea in abatement of the non-joinder of the owners of the other part of the patent is bad. (*Dunnicliff* v. *Mallet*, 29 L. J. C. P. 70; 7 C. B. N. S. 209.) A person entitled in common with another to the use of a trade-mark may sue alone in chancery for an injunction to restrain its use, and for an account and payment of profits. (*Dent* v. *Turpin*, 30 L. J. C. 495.)

The *misjoinder of a defendant* would only entitle that defendant to a ver-

Plea of accord and satisfaction made by a co-trespasser or party jointly liable, not being a co-defendant in the action: Thurman v. *Wilde*, 11 A. & E. 453; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52.

AGENTS.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

Plea denying the Retainer of the Defendant.

That the plaintiff did not employ the defendant [as his agent] for the purpose and on the terms in the declaration mentioned as therein alleged.

ASSAULT.

See *post*, "*Trespass to the Person*," p. 666.

ATTORNEYS.

See *ante*, "*Pleas in Contracts*," p. 430.

AVOWRY. See *post*, "*Replevin*," p. 665.

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dict, without affecting a verdict against the others. (*Govett* v. *Radnidge*, 3 East, 62; *Bretherton* v. *Wood*, 3 B. & B. 54; *Pozzi* v. *Shipton*, 8 A. & E. 963; *Morrow* v. *Belcher*, 4 B. & C. 704.)

The *non-joinder of a defendant* is no ground of objection; and a plea in abatement for the non-joinder of another joint wrong-doer would be bad on demurrer. (*Mitchell* v. *Tarbutt*, 5 T. R. 649; *Ansell* v. *Waterhouse*, 6 M. & S. 385.)

All parties engaged in a common wrongful act are liable jointly and severally. (Co. Lit. 232 a; 1 Wms. Saund. 291 f; *Sutton* v. *Clarke*, 6 Taunt. 29; and see *R.* v. *Brown*, 26 L. J. M. C. 183; 7 E. & B. 757.) Partners in business are all liable for the negligence of each in the conduct of the partnership business. (*Moreton* v. *Hardern*, 4 B. & C. 223; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333; and see "*Partners*," *ante*, p. 329.)

(*a*) In actions against agents, attorneys, brokers, etc., framed in the form of tort, the plea of the general issue denies the breach of duty or wrongful act alleged. The retainer or employment alleged must, if denied, be specifically traversed (r. 16, T. T. 1853).

BAILMENTS.

See *ante*, "*Pleas in Contracts*," p. 436.

CARRIERS.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea, to a Count for refusing to carry, traversing that the Defendant was a Common Carrier.

That he was not a common carrier of goods [*or* of passengers and their luggage] as alleged.

Plea traversing the Delivery and Receipt of the Goods (*b*).

That the plaintiff did not deliver to him, nor did he receive from the plaintiff, the said goods or any of them, for the purpose and on the terms alleged.

Plea, to a Count for refusing to carry, that the Plaintiff was not ready and willing to pay the Carriage.

That the plaintiff was not ready and willing, nor did he offer to pay to the defendant his reasonable hire for the receipt, carriage and delivery of the said goods as alleged.

Plea, to a count for not delivering the goods, that the defendant tendered the goods and demanded the price of the carriage, which

(*a*) In actions against carriers if the count is framed in tort, the appropriate form of the general issue is *not guilty*. By r. 16, T. T. 1853, "In actions against a carrier the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received." It will also operate as a denial of any other breach of duty or wrongful act alleged. No other defence than such denial is admissible under that plea; all other pleas in denial must take issue on some particular matter of fact alleged in the declaration. Under not guilty the defendant cannot prove any antecedent negligence or omission on the part of the plaintiff as causing or excusing the breach alleged, such as insufficient packing of the goods or misrepresentation as to their weight. (*Webb* v. *Page*, 6 M. & G. 196.) The facts alleged as giving rise to the duty of the defendant, as the delivery and receipt of the goods, if denied, must be traversed in terms.

As to pleading to counts against carriers, where the cause of action may be considered to partake of the character both of a breach of contract and of a wrong, see *ante*, p. 589.

(*b*) If the defendants are charged as common carriers, and the goods are received upon any special terms or conditions, altering the common law liability of the carrier, the defendant would be entitled to a verdict on this issue. (*Ante*, p. 473 (*b*).)

the plaintiff refused to pay: Crouch v. *Great Western Ry. Co.*, 26 L. J. Ex. 418; 2 H. & N. 491.

See other pleas in actions against Carriers, ante, p. 469.

COGNIZANCE. See "*Replevin*," *post*, p. 655.

COMMON.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Possession.

That the plaintiff was not possessed of the said messuage and land as alleged.

Plea traversing the Plaintiff's Right of Common of Pasture.

That the plaintiff was not entitled to the said common of pasture as alleged.

Plea of approvement of common by the owner in fee under statutes 20 *Hen. III. c.* 4, *and* 13 *Edw. I. c.* 1, *by erecting buildings and enclosing, leaving sufficient common for the commoners: Patrick* v. *Stubbs*, 9 M. & W. 830; *and see post, p.* 606.

Plea of a Right of Common of Pasture, under the 2 *&* 3 *Will. IV. c.* 71, *ss.* 1, 5. (*C. L. P. Act*, 1852, *Sch. B.* 47) (*b*).

That the defendant at the time of the alleged trespass was pos-

(*a*) In actions for the disturbance of rights of common, the general issue, not guilty, operates as a denial of the act of disturbance alleged to have been commited by the defendant. The plaintiff's possession of the tenements in respect of which he claims, also the right claimed, if denied, must be traversed in terms. (r. 16, T. T. 1853.)

By the Prescription Act, 2 & 3 Will. IV. c. 71, s. 5, under a denial of the general allegation of the right, all and every the matters in that Act mentioned and provided, which may be applicable to the case, are admissible in evidence to sustain or rebut such allegation; see *ante*, p. 249, and *post*, p. 603.

(*b*) *Pleas of rights of common.*]—A right of common or other prescriptive right, as a right of way, or right to a watercourse, may be stated generally in a declaration; but in pleas and subsequent pleadings the title must be set forth with greater particularity. (1 Wms. Saund. 345 (2); *ante*, 249 (*a*).)

Before the Prescription Act, the plea of a right of common claimed as

sessed of land, the occupiers whereof for thirty [*or* sixty] years before this suit enjoyed as of right and without interruption common of pasture over the said land of the plaintiff for all their cattle levant and couchant upon the said land of the defendant at all times of the year, as to the said land of the defendant appertaining; and that the alleged trespass was a use by the defendant of the said right of common.

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appurtenant to land stated the defendant's title to the land by showing a seisin in fee in himself, or in some person through whom he derived title, and then stated that *he and all those whose estate he had* in the land from time immemorial had the right of common; this form of plea was called prescribing in a *que estate*. The plea asserting a right of common *in gross* not being appurtenant to any land, stated *that the defendant and all his ancestors, whose heir he is*, from time immemorial had the right of common, without laying title to any land. (1 Wms. Saund. 345, 346; and see *Welcome* v. *Upton*, 5 M. & W. 398; *Attorney-General* v. *Gauntlett*, 3 Y. & J. 93.)

By the Prescription Act, 2 & 3 Will. IV. c. 71, s. 5, it is enacted that "In all actions upon the case and other pleadings wherein the party claiming may now by law allege his right generally without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this Act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

A prescriptive right may still be pleaded in the old form, as annexed to the estate in fee, and as existing from time immemorial; but it must then be supported as such immemorial right by the evidence, and cannot be aided by the statute. A prescriptive right subsisting by force of the statute must be pleaded according to the fact. (*Welcome* v. *Upton*, 5 M. & W. 398; and see *Holford* v. *Hankinson*, 5 Q. B. 584, 587.) Easements in gross are not within the statute. (*Welcome* v. *Upton*, *supra*; and see per Willes, J., *Bailey* v. *Stevens*, 31 L. J. C. P. 226, 229.) As to time immemorial, see *post*, "*Custom*," p. 610.

It is sometimes necessary to repeat the plea of a prescriptive right in order to rely on the period of sixty years as well as on the period of thirty. Where the plea is long, the subsequent plea may be pleaded shortly by reference to the previous plea as follows: "And for a —— plea the defendant repeats what is alleged in the —— plea, substituting the period of sixty years for the period of thirty years." (See *ante*, p. 385.)

It is often advisable to plead a plea of prescription at common law as well as the pleas of prescription under the statute, to meet the case of a failure under the latter in consequence of an interruption in the use. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Lowe* v. *Carpenter*, 6 Ex. 825.)

Plea by a Freeholder of a Right of Common by Prescription at Common Law.

That at the time of the alleged trespass he was seised in fee of land, and he and all those whose estate he then had therein from time immemorial enjoyed common of pasture over the said land of the plaintiff for all their cattle levant and couchant upon the said land of the defendant at all times of the year, as to the said land of the defendant appertaining; and that the alleged trespass was a use by the defendant of the said right of common.

Plea by a Tenant of a Right of Common by Prescription at Common Law.

That before the alleged trespass and at the time of the making of the demise hereinafter mentioned, *J. K.* was seised in fee of land, and he and all those whose estate he then had therein from time immemorial enjoyed common of pasture for themselves and their tenants over the said land of the plaintiff for all their cattle levant and couchant upon the said land of the said *J. K.* at all times of the year, as to the said land of the said *J. K.* appertaining; and the said *J. K.*, being so seised as aforesaid, before the alleged trespass demised the said land with the appurtenances to the defendant to hold the same for —— years from the —— day of —— A.D. —— [*or* from year to year so long as the said *J. K.* and the defendant should respectively please], by virtue of which said demise the defendant afterwards and before the alleged trespass entered into the said land, with the appurtenances so demised as aforesaid, and became and until and at the time of the alleged trespass was possessed thereof; and that the alleged trespass was a use by the defendant of the said right of common. [*See Attorney-General* v. *Gauntlett*, 3 Y. & J. 93.]

Plea justifying pulling down obstructions to the defendant's right of common: Perry v. *Fitzhowe*, 8 Q. B. 757; *Davies* v. *Williams*, 20 L. J. Q. B. 330

Plea justifying driving the plaintiff's sheep because they were trespassing where the defendant had a right of common: Papendick v. *Bridgwater*, 5 E. & B. 166.

Plea of a right of common of pasture by custom within a manor: Arlett v. *Ellis*, 7 B. & C. 346; 9 B. & C. 671.

Plea by a burgess of a right of common of pasture granted to the borough: Mellor v. *Spateman*, 1 Wms. Saund. 339; *Parry* v. *Thomas*, 5 Ex. 37.

Plea of a right of sole pasturage in gross: Welcome v. *Upton*, 5 M. & W. 398; 6 M. & W. 536.

Pleas of rights of common of pasture pur cause de vicinage: Heath v. *Elliott*, 4 Bing. N. C. 388; *Jones* v. *Robin*, 10 Q. B. 581; *Prichard* v. *Powell*, ib. 589; *Clarke* v. *Tinker*, 10 Q. B. 604.

Plea of a right of common of pasture for a certain number of cattle of a certain kind by reason of occupancy of land: Nichols v. *Chapman*, 5 H. & N. 643; 29 L. J. Ex. 461.

Plea by a copyhold tenant of a right of common of turbary within the manor: Grant v. *Gunner*, 1 Taunt. 435.

Plea of a right to dig minerals: Paddock v. *Forrester*, 3 M. & G. 903.

Plea by a customary tenant of a right to dig coals under his tenement: Anglesey v. *Hatherton*, 10 M. & W. 218; *Wilkinson* v. *Proud*, 11 M. & W. 33.

Plea of a right to dig clay for bricks: Clayton v. *Corby*, 3 Q. B. 813.

Plea of a right to enter a close to take sand and marl: Blewett v. *Tregonning*, 3 A. & E. 554; *Glover* v. *Dixon*, 9 Ex. 158.

Replication traversing the Right of Common claimed under the 2 & 3 Will. IV. c. 71, ss. 2, 5 (a).

That the occupiers of the said land did not for thirty [*or* sixty] years before this suit enjoy as of right and without interruption the alleged right of common.

Replication that the Cattle were not Defendant's Commonable Cattle (b).

That the said cattle were not the defendant's [commonable] cattle levant and couchant upon the said land of the defendant.

Replication, to a plea of a right of common by prescription at common law, that the close in which the trespasses were committed had been enclosed for twenty years (c): Hawke v. *Bacon*, 2 Taunt. 156;

(*a*) A like replication to a plea of right of way is given in the C. L. P. Act, 1852, sched. B. 54. A replication taking issue under that Act, s. 79, may be adopted; it would put in issue the right only, and not that the alleged trespasses were committed in exercise of it. If the plaintiff contends that the trespasses were not committed in exercise of the right, he must new assign. (*Glover* v. *Dixon*, 9 Ex. 158; and see *post*, "*New Assignment*," p. 636.)

The replication puts in issue an uninterrupted enjoyment as of right, and the plaintiff may show any matters inconsistent with such enjoyment (see 2 & 3 Will. IV. c. 71, s. 5, *ante*, p. 603), as that it was enjoyed during a portion of the time by licence. (*Tickle* v. *Brown*, 4 A. & E. 369; *Bright* v. *Walker*, 1 C. M. & R. 211; *Beasley* v. *Clarke*, 2 Bing. N. C. 705.) An agreement or licence giving the right during the whole period must be specially replied. (Ib.; and see *Kinloch* v. *Nevile*, 6 M. & W. 795, 806.) Unity of possession during the whole or part of the period may be proved under the above issue. (*Onley* v. *Gardiner*, 4 M. & W. 496; *England* v. *Wall*, 10 M. & W. 699; *Clayton* v. *Corby*, 2 Q. B. 813.)

All provisoes, exceptions, incapacities, disabilities, etc., mentioned by the statute, as infancy, idiotcy, insanity, coverture, tenancy for life, pendency of action, terms of years, or for life, during which the time is not computed, must be specially replied. (See 2 & 3 Will. IV. c. 71, ss. 5, 7, 8.)

(*b*) The above replication is necessary where it is denied that any of the cattle in question were commonable cattle of the defendant. Under this replication the plaintiff cannot rely upon a surcharge; to do so he must new assign. (*Bowen* v. *Jenkin*, 6 A. & E. 911.)

(*c*) If the right is pleaded under the statute, a special replication of an enclosure seems to be unnecessary. If the plea claims title by grant, an extinction by an enclosure under an Enclosure Act must be replied. (*Parry* v. *Thomas*, 5 Ex. 37.)

Richards v. *Peake*, 2 B. & C. 918; *Tapley* v. *Wainwright*, 5 B. & Ad. 395.

Replication of Approvement of Common (*a*).

That before the alleged trespasses the said close was parcel of a waste situate in the manor of ——, of which waste *J. K.*, as and being the lord of the said manor, was seised in fee, and the said *J. K.* being so seised before the alleged trespasses approved and enclosed the said close from the residue of the said waste, leaving sufficient common of pasture there for the use of the defendant and of all other persons entitled to right of common over the said waste, together with sufficient ingress and egress for them to take, have, and use their said right of common upon all the residue of the said waste; and the said *J. K.* afterwards, and before the alleged trespasses, demised the said close to the plaintiff.

Like replications: Lake v. *Plaxton*, 10 Ex. 196; *Grant* v. *Gunner*, 1 Taunt. 435; *Shakespear* v. *Peppin*, 6 T. R. 741.

CONSTABLES. See "*Police*," *ante*, p. 334.

CONVERSION OF GOODS OR TROVER.

General Issue (*b*).

"Not Guilty," *ante*, p. 589.

(*a*) The right of approvement exists under the statutes 20 Hen. III. c. 4, and 13 Edw. I. st. 1, c. 46. (*Patrick* v. *Stubbs*, 9 M. & W. 830.) A custom for the lords of a manor to enclose parcels of the waste may be proved under an issue taken upon a plea of a right of common by custom in the manor, without a special replication. (*Arlett* v. *Ellis*, 7 B. & C. 346.)

(*b*) By r. 20, T. T. 1853, "in actions for taking, damaging or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, and converting the goods mentioned, but not of the plaintiff's property therein."

As to what amounts to a conversion, see *ante*, p. 253. As it must necessarily be a wrongful act, the plea of not guilty puts in issue not only the act constituting the conversion, but also the circumstances which make it wrongful. (*Whitmore* v. *Greene*, 13 M. & W. 104, 107; *Young* v. *Cooper*, 6 Ex. 259; overruling *Standcliffe* v. *Hardwick*, 2 C. M. & R. 1; and see *Ringham* v. *Clements*, 12 Q. B. 260; and *ante*, p. 591.)

Thus leave and licence from the plaintiff, or from one jointly interested in the goods with the plaintiff, or any other circumstance (not inconsistent with the plaintiff's property) showing the act not to be wrongful, as that the goods were taken under a distress, or under a writ of *fi. fa.*, may be given in evidence under this issue. (*Unwin* v. *St. Quintin*, 11 M. & W. 281; *Young* v. *Cooper*, 6 Ex. 259; *Whitmore* v. *Greene*, 13 M. & W. 104.)

Under this issue the defendant cannot assert any matter of title, because the plea confesses the plaintiff's property. (*Jones* v. *Davies*, 6 Ex. 663;

Plea traversing the Plaintiff's Property in the Goods (a).

That the said goods were not nor was any of them the plaintiff's as alleged.

Plea to a Count by the Assignees of a Bankrupt for a Conversion before the Bankruptcy, traversing the Property.

That the said goods were not nor was any of them the goods of the said *E. F.* as alleged.

Barton v. *Brown*, 5 M. & W. 298.) Thus under this issue the defendant cannot assert a lien (*White* v. *Teal*, 12 A. & E. 106; *Mason* v. *Farnell*, 12 M. & W. 674, 683), but he may do so under a plea traversing the property. (See *infra*, n. (*a*).)

It seems to be held that it is under this issue (rather than under the denial of the plaintiff's property) that the defendant may show that he was joint owner of the goods with the plaintiff, unless he has been guilty of an act inconsistent even with joint ownership; as a complete destruction of the goods, or of the plaintiff's property therein. (2 Wms. Saund. 47 *o*; *Higgins* v. *Thomas*, 8 Q. B. 908; *Jones* v. *Brown*, 25 L. J. Ex. 345.) A mere sale by one joint tenant does not amount to a conversion, as it does not affect the property of the other joint owner; but if it be made in such a way, as by sale in market overt, as to pass the whole property to the purchaser, and totally deprive the joint owner of the goods, it then is a conversion (*Mayhew* v. *Herrick*, 7 C. B. 229) so, creating a lien by one joint owner is not a converson. (*Jones* v. *Brown*, *supra*.) A special plea justifying as joint owner with the plaintiff should show that the alleged act of conversion was merely an exercise of the right of a joint owner. (See *Higgins* v. *Thomas*, 8 Q. B. 908; *Jones* v. *Brown*, *supra*, where such a plea was pleaded.)

As to an application to the court to stay proceedings in this action upon a return of the goods, see *ante*, p. 255.

(*a*) The plaintiff's property in the goods is admitted by the plea of not guilty, and therefere, if disputed, must be specifically traversed. (*White* v. *Teal*, 12 A. & E. 106; *Barton* v. *Brown*, 5 M. & W. 298; *Jones* v. *Davies*, 6 Ex. 663.) The plea traversing that the goods were the plaintiff's, denies the plaintiff's *right to the possession* of the goods, as against the defendant, at the time of the conversion. (*Nicolls* v. *Bastard*, 2 C. M. & R. 662; *Isaac* v. *Belcher*, 5 M. & W. 139; *Ringham* v. *Clements*, 12 Q. B. 260.)

The plaintiff must prove a right of present possession of the goods, and not merely a reversionary right. (*Bradley* v. *Copley*, 1 C. B. 685.) An owner of goods in the possession of another having a right of lien cannot maintain this issue against the latter (*Milgate* v. *Kebble*, 3 M. & G. 100; *Richards* v. *Symons*, 8 Q. B. 90); but a proof of any special or temporary ownership if in immediate possession, as a lien, is sufficient to maintain the issue. (*Legg* v. *Evans*, 6 M. & W. 36.)

Possession in fact is *primâ facie* evidence of present property, and is therefore sufficient to maintain this issue against a wrongdoer who cannot show a better title or authority. (*Elliott* v. *Kemp*, 7 M. & W. 312; *Northam* v. *Bowden*, 11 Ex. 70; *Armory* v. *Delamirie*, 1 Smith's L. C. 5th ed. 301.) If the plaintiff was not in possession of the goods at the time of the conversion he must rely upon his right only, and must be able to prove a good title in himself as against the possessory title of the defendant; in such case, the defendant may rebut the plaintiff's proof by showing a *jus tertii*. (*Butler* v. *Hobson*, 4 Bing. N. C. 290; *Gadsden* v. *Barrow*, 9 Ex. 514; *Leake* v. *Loveday*, 4 M. & G. 972.) If however the plaintiff, having once been in possession of the goods, was deprived thereof by the wrongful act

Plea to a Count by the Assignees of a Bankrupt for a Conversion after the Bankruptcy, traversing the Property.

That the said goods were not nor was any of them the goods of the plaintiffs as such assignees as aforesaid as alleged.

Plea that the Plaintiff had recovered judgment in an action for the conversion of the same goods against a third party, who had previously sold them to the defendant, which was the conversion complained of: *Cooper* v. *Shepherd*, 3. C. B. 266 (*a*).

Plea that the conversion consisted of a wrongful sale of the goods, and that afterwards the plaintiff waived the tort by claiming the proceeds of the sale, a portion of which the defendant then paid him: *Lythgoe* v. *Vernon*, 5 H. & N. 180; 29 L. J. Ex. 164.

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of the defendant, the prior possession of the plaintiff would be *primâ facie* proof of property as against the defendant; and the latter would in such case be estopped from setting up a *jus tertii*, unless he could justify his act by authority under the *jus tertii*. (*Jeffries* v. *Gt. Western Ry. Co.*, 25 L. J. Q. B. 107; 5 E. & B. 802; *Fyson* v. *Chambers*, 9 M. & W. 460; *ante*, p. 254; and see *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 L. J. Ex. 407.)

The defendant may set up a right of lien under a plea traversing the property in the goods. (*Owen* v. *Knight*, 4 Bing. N. C. 54; *Brandao* v. *Barnett*, 1 M. & G. 908; *Richards* v. *Symons*, 8 Q. B. 90.) See the defence of a lien by an innkeeper set up under this plea, *Broadwood* v. *Granara*, 10 Ex. 417; and see the cases there cited. So a lien upon goods seized for non-payment of toll. (*Free* v. *White*, 1 Dowl. N. S. 586.) A special plea setting up a lien would formerly have been specially demurrable as amounting to an argumentative traverse of the property in the goods. (*Jackson* v. *Cummins*, 5 M. & W. 342, 349; *Dorrington* v. *Carter*, 1 Ex. 566.)

Under this issue the defendant may take advantage upon the evidence of any conduct of the plaintiff which may have estopped him from asserting the goods to be his; as where the goods of the plaintiff were wrongfully sold, but the plaintiff knowingly stood by and allowed the defendant to buy them, or where the plaintiff represented them to be the goods of another. (*Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90; *Freeman* v. *Cooke*, 2 Ex. 654; and see *Cornish* v. *Abingdon*, 28 L. J. Ex. 262.)

In an action against the assignees of a bankrupt for converting the goods of the plaintiff, the defendants may show under this issue that the goods at the time of the conversion were in the order and disposition of the bankrupt with the consent of the plaintiff. (*Isaac* v. *Belcher*, 5 M. & W. 139.) Under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 125, an order of the court is necessary for the vesting of the property in the assignees, but the title of the assignees relates back to the act of bankruptcy; therefore such order may be relied on under the above issue, although it was not obtained until after the action was brought. (*Heslop* v. *Baker*, 8 Ex. 411.)

This issue is divisible, and may be found for the plaintiff as to some of the goods, and for the defendant as to the others. (*Williams* v. *Great Western Ry. Co.*, 1. Dowl. N. S. 16; *Freshney* v. *Wells*, 26 L. J. Ex. 228.)

(*a*) By the recovery of a judgment in an action for the conversion of goods, the plaintiff's right of property is barred (*Cooper* v. *Shepherd*, 3 C. B. 266), and it seems that the property vests in the defendant from the date of the conversion. (*Buckland* v. *Johnson*, 15 C. B. 145.)

COPYRIGHT.

General Issue (a).

"Not Guilty," *ante*, p. 589.

Plea traversing that the Plaintiff was the Proprietor of the Copyright.

That the plaintiff was not the proprietor of the said copyright as alleged.

Plea traversing that the Copyright was subsisting.

That the said copyright was not a subsisting copyright as alleged.

Plea that the book was not first printed in England: Boosey v. *Davidson*, 4 D. & L. 147; *Chappell* v. *Purday*, 12 M. & W. 303; 14 M. & W. 303; *Boosey* v. *Purday*, 4 Ex. 145.

Plea that the book was printed and published and sold by the plaintiff without the name of the printer, contrary to the statute 2 & 3 *Vict. c.* 12; *Chappell* v. *Davidson*, 25 L. J. C. P. 225; 18 C. B. 194.

Plea that the plaintiff fraudulently published the book as the work of an author who did not write it: Wright v. *Tallis*, 1 C. B. 893.

Notice to be given with Pleas in an Action for Piracy of Copyright. (5 & 6 Vict. c. 45, s. 16 (b).)

In the ——.

A. B. plaintiff against *E. F.* defendant.

Take notice that the above-named defendant means to rely on the trial of this action on the following objections :—

(*a*) The general issue, not guilty, denies the alleged infringement of the copyright, whether it be in selling, printing, etc., or whatever be the wrongful act charged. In an action for selling a copy of a print from a spurious plate under the 17 Geo. III. c. 57, it denies the mere act of selling, and not the knowledge of the defendant that the copy was printed from a spurious plate, which is immaterial. (*Gambart* v. *Sumner*, 29 L. J. Ex. 98; 5 H. & N. 5.) It admits the copyright of the plaintiff, which, if denied, must be traversed in terms. Any circumstances avoiding his right must be pleaded specially.

(*b*) By the 5 & 6 Vict. c. 45, s. 16, it is enacted that in any action for infringing a copyright in a book under that statute "the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the

1. That the defendant is not guilty of the alleged grievances.
2. That the plaintiff was not the proprietor of the said copyright.
3. That at the time of the alleged grievances there was no subsisting copyright in the said book.
4. That *J. K.* and not the plaintiff was the author of the said book.
5. That *L. M.* and not the plaintiff was the first publisher of the said book.
6. That *N. O.* and not the plaintiff is the proprietor of the said copyright.
7. That the said book was first published with the title —— [*specify the title of the book as first published*], on the —— day of ——, A.D. —— [*specify the date of first publication*], at —— [*specify the place of the first publication*].

[*State any other objections in the same manner.*]

To Yours, etc.,

Mr. *C.D.* plaintiff's attorney or agent. *G. H.* defendant's attorney [*or* agent].

See like notices: Boosey v. *Davidson*, 4 D. & L. 147; *Sweet* v. *Benning*, 16 C. B. 459.

COUNTY COURTS. See *ante*, p. 261.

CUSTOM (*a*).

Plea of a right of common of pasture by custom within a manor: Arlett v. *Ellis*, 7 B. & C. 346; 9 B. & C. 671.

Plea of a custom in a manor to seize heriots: Kingsmill v. *Bull*, 9 East, 185; *Price* v. *Woodhouse*, 16 M. & W. 1.

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place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice." (See 2 Chit. Pr. 11th ed. 1453.)

(*a*) A custom is a usage which obtains the force of law within a particular district, or at a particular place, in respect of the persons and things which it concerns. It must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. (1 Bl. Com. 76; *Tyson* v. *Smith*, 9 A. & E. 406, 421; *Blewett* v. *Tregonning*, 3 A. & E. 554; *Rogers* v. *Taylor*, 26 L. J. Ex. 203; 1 H. & N. 706.) Time immemorial dates from the beginning of the reign of Richard I., A.D. 1189. (2 Bl. Com. 31.) Proof of uninterrupted modern usage is presumptive evidence of the previous existence of the custom, but may be rebutted by proof of its non-existence at any time within the above period of legal memory. (1 Bl. Com. 76; 2 Ib. 31; *Jenkins* v. *Harvey*, 1 C. M. & R. 877.)

Plea of a custom in a township for the inhabitants to use a well: Race v. *Ward*, 26 L. J. Q. B. 153; 4 E. & B. 702; 7 E. & B. 384.

Plea of a custom in a parish for the inhabitants to take drifted sand from a certain close: Blewett v. *Tregonning*, 3 A. & E. 562.

Plea of a custom in a parish for the inhabitants to beat the bounds: Taylor v. *Devey*, 7 A. & E. 409.

Plea justifying the erection of booths, etc., by a custom to hold a fair on the spot: Tyson v. *Smith*, 6 A. & E. 745; 9 A. & E. 406.

Replication in an action for pulling down the plaintiff's booth, to which defendant pleaded that it was erected on a public highway, that there was a custom to hold a fair in the highway, and to erect booths there, leaving sufficient space for the highway: Elwood v. *Bullock*, 6 Q. B. 383.

DAMAGE FEASANT. See *post*, "*Distress*," p. 618; "*Replevin*," p. 659.

DEFAMATION: LIBEL AND SLANDER.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

(*a*) In actions for libel or slander, the plea of *not guilty* denies the publication of the matter, the publication of it maliciously and in the defamatory sense imputed, or in any other defamatory actionable sense which the words themselves import. Therefore the *innuendo* or meaning imputed to the words is put in issue by this plea; but the plaintiff is no longer limited to proving that the words were used in that sense if they were actionable of themselves. (C. L. P. Act, 1852, s. 61, cited *ante*, p. 265; and see *post*, 613.)

By r. 16, T. T. 1853, "In an action for slander of the plaintiff in his office profession or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged." The latter fact, if denied, must be traversed in terms.

Under the plea of not guilty the defendant may prove that the words were spoken or published on a privileged occasion. (1 Wms. Saund. 130 (*d*); *Lillie* v. *Price*, 5 A. & E. 645; *Pattison* v. *Jones*, 8 B. & C. 578; *Lewis* v. *Levy*, 27 L. J. Q. B. 282; *Hoare* v. *Silverlock*, 9 C. B. 20; *Earl Lucan* v. *Smith*, 26 L. J. Ex. 94; 1 H. & N. 481; *Carr* v. *Duckett*, 29 L. J. Ex. 468.) And the plaintiff may show in answer to this that the publication was not within the privilege by proving actual malice; thus he may show that the charge was false to the knowledge of the defendant; and the latter, again, may give evidence to rebut the plaintiff's proof in this respect by showing that he knew it to be true. (*Fountain* v. *Boodle*, 3 Q. B. 5.) As to what are privileged occasions, see *ante*, p. 263.

A special plea stating that the article was a fair comment in a public journal on the public acts of a public man has, since the C. L. P. Act, 1852, been allowed together with the plea of not guilty. (*Earl Lucan* v. *Smith*, 1 H. & N. 481; 26 L. J. Ex. 94.) It has sometimes been thought ad-

Plea, to an Action for Slander of the Plaintiff in his Trade, denying that the Plaintiff carried on the Trade.

That the plaintiff did not carry on the business of a —— as alleged.

Plea of Justification, that the alleged Libel or Slander is true (*a*).

That before the alleged grievance [*here state the facts relied on as a justification of the truth of the libel or slander. If the charge to be justified is* "he is a regular prover under bankruptcies" (*see the declaration, ante, p.* 262), *this may be done as follows: J. K.* was a

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visable to plead the defence of privilege specially where it is wished to raise the question on the record by demurrer. (Ib.; and see *Lewis* v. *Levy*, 27 L. J. Q. B. 282, where there was a special plea that the libel was a correct report of a preliminary inquiry before a justice of the peace on a charge of perjury.)

In actions for slander in respect of words not actionable in themselves, but only by reason of special damage caused by them, the plea of not guilty also puts in issue the special damage alleged. (*Wilby* v. *Elston*, 8 C. B. 142.) In such actions the plaintiff cannot prove general damage beyond the special damage laid. (*Dixon* v. *Smith*, 29 L. J. Ex. 125.)

(*a*) A justification of the libel or slander on the ground of its truth must be pleaded specially, and cannot be proved under the general issue (*Smith* v. *Richardson*, Willes, 20; *Underwood* v. *Parks*, 2 Strange, 1200; 1 Wms. Saund. 130, n. (1)); although, as stated in the preceding note, the question of the truth of the charge may sometimes arise incidentally under that plea. A justification on this ground should not be pleaded without good reason to expect that it will be proved; for if it is pleaded upon insufficient grounds it may be taken into consideration by the jury in assessing the damages. (*Wilson* v. *Robinson*, 7 Q. B. 68.) A plea that the libel had previously been published by another, and that the defendant at the time of publishing it stated the source from which he received it, and then believed it to be true, was held a bad plea. (*Tidman* v. *Ainslie*, 10 Ex. 63.)

If a libel consists of several distinct charges, or is divisible into distinct parts, a plea of justification may be pleaded to part only. (*Mountney* v. *Watton*, 2 B & Ad. 673; *Clarke* v. *Taylor*, 2 Bing. N. C. 664, 665; *M'Gregor* v. *Gregory*, 11 M. & W. 287; *Clarkson* v. *Lawson*, 6 Bing. 587; and see the notes to *I'Anson* v. *Stuart*, 2 Smith's L. C. 5th ed. 55, 67.)

As to the form in which a plea of justification may be pleaded some uncertainty exists, and the practice of the learned judges is not yet uniform or settled. (See *Honess* v. *Stubbs*, 7 C. B. N. S. 555; 29 L. J. C. P. 220; *Behrens* v. *Allen*, 8 Jur. N. S. C. P. 118.)

It seems, however, that where the libel or slander is a direct charge by the defendant of specific acts, and the words are actionable *per se*, the plea of justification may be allowed to be pleaded in a general form, thus, "that the words written [*or* spoken] and published of the plaintiff by the defendant as alleged, were and are true in substance and fact." In such a case this general form is in effect as specific and particular as a more formal plea; for the plea in any other form need, at the present day, be only a repetition of the charge in the words alleged in the declaration. But this general form of plea will be insufficient and bad in substance whenever the words complained of, instead of being a direct and positive charge made by the defendant, are in the form of something reported or repeated as said by another, for in such a case the plea might only aver the truth of the charge having been made, and not the truth of the charge itself. (*Duncan* v. *Thwaites*, 3 B. & C. 556.) It would also be bad in substance when the natural meaning of the words is extended by an innuendo in order to give them an actionable quality, (though this might perhaps be remedied by

trader subject to the statutes then in force concerning bankrupts, and had committed an act of bankruptcy and become a bankrupt within the meaning of the said statutes, and a petition for adjudication of bankruptcy had been duly filed against him in the Court of Bankruptcy for the —— district, and he had been duly adjudged bankrupt by the said court; and thereupon the plaintiff falsely and fraudulently pretending to be a creditor of the said *J. K.* at the time of the said bankruptcy, then assumed to prove and in due form of law proved against the estate of the said *J. K.*, as such bankrupt as aforesaid, in the said court a debt of £—— as due to the plaintiff, whereas the said debt was not due to the plaintiff but the same was a fictitious debt, as the plaintiff at the time of so proving the same well knew; and before the alleged grievance *L. M.* was a trader, *etc. State in like manner all the instances of the plaintiff having proved fictitious debts under bankruptcies with the knowledge that they were fictitious, which are relied as justifying the imputation of his habit of doing so: or if the charge to be justified is* "he is the person who took my horse," *or* "he is a thief," (*see the declarations, ante, p.* 267) *the fact may be stated thus:* the plaintiff feloniously stole a horse of the defendant.]

A Plea denying the Use of the Words with the meaning imputed to them, and justifying them as true in their natural sense (*a*).

That he spoke and published [*or* wrote, *or* printed and published, *according to the declaration*] of the plaintiff the words in the decla-

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adding "in the sense in which they are alleged to have been used," or words to that effect.)

When the charges contained in the libel or slander, instead of being specific, are general, and particularly when they impute indictable matter, a general form of plea ought not to be used. It is contrary to the essential objects of pleading, namely, that the other side should be informed of what facts are to be tried, and that the court should be able to judge whether the facts relied on are, if true, sufficient in law. The former object may no doubt be attained by the delivery of particulars, but there is no sufficient reason why the proper office of pleading should be superseded by this more complicated and expensive substitute. In practice, too, it is a matter of frequent experience that imputations are sought to be justified in a general form which no one could attempt to justify specifically; and thus the test which pleading affords, even to the pleader himself, of the validity of a defence, is lost. The other object, that of enabling the Court to judge of the sufficiency in law of the justification, is unavoidably sacrificed by a general plea: the plaintiff is in effect precluded from obtaining the opinion of the court (and of a court of error) on the question whether the facts justify the imputation, and the matter has to be left in the hands of the jury in cases most peculiarly open to feeling and prejudice. And after all there remains no record of the distinct determination of any particular facts which can be afterwards binding on the parties.

In the only cases therefore in which a general plea of justification can be sufficient no trouble is saved by adopting it; and the safest and best course appears to be in all cases to justify specifically. (See the observations in the note to *l'Anson* v. *Stuart*, 2 Smith's L. C. 5th ed. 55, 65; and see *Hickinbotham* v. *Leach*, 10 M. & W. 361; *Holmes* v. *Catesby*, 1 Taunt. 543; *Oliver* v. *Bentinck*, 3 Taunt. 456; *Jones* v. *Stevens*, 11 Price, 235.)

(*a*) A difficulty in justifying a libel or slander on the ground of the charge being true may in some cases arise in consequence of the valuable provision

ration mentioned, but did not mean thereby [*repeat the meaning imputed to them in the words of the declaration*] as alleged; and the defendant says that [*state the facts relied on to prove that the charge is true in the natural meaning of the words, as in an ordinary plea of justification*].

Plea to a libel imputing a general charge of baseness, that the libel was published in reference to a particular transaction and justifying it: Tighe v. *Cooper*, 7 E. & B. 639.

Special plea that the matter published was a fair comment in a newspaper on the public acts of a public man: Earl of Lucan v. *Smith*, 26 L. J. Ex. 94; 1 H. & N. 481; *Cooper* v. *Lawson*, 8 A. & E. 746.

Plea that the libel was a correct report of a preliminary inquiry before a justice of the peace in which the plaintiff was summoned to answer a charge of perjury and was discharged: Lewis v. *Levy*, 27 L. J. Q. B. 282.

Notice of the Defendant's Intention of giving Evidence of an Apology in Mitigation of Damages, to be delivered with the Plea, under the 6 & 7 Vict. c. 96, s. 1 (a).

In the ——.

Between *A. B.* plaintiff and *E. F.* defendant.

Take notice, that the defendant intends on the trial of this cause to give in evidence, in mitigation of damages, that he made [*or* offered] an apology to the plaintiff for the defamation complained of in the declaration herein, before the commencement of this action [*or* as soon after the commencement of this action as there was an op-

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contained in the 61st section of the C. L. P. Act, 1852. That section allows a plaintiff to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, and provides that where the words or matter set forth with *or without the alleged meaning*, show a cause of action, the declaration shall be sufficient. (See *ante*, p. 265.) A plaintiff, availing himself of this section, may impute to words actionable *per se* a meaning different to that which they would most naturally bear; and the defendant may be able to show that he did not use them with the alleged meaning, and to justify them on the ground of truth in the sense in which he did use them. In such a case, however, it will not be sufficient for him to plead simply a justification in the latter sense, because the plea would be an admission of the charge in the sense imputed in the declaration, and would be no answer to the charge so confessed. It is suggested that in such a case the defendant should plead in the above form or to the like effect.

(*a*) By the 6 & 7 Vict. c. 96, s. 1, it is enacted "That in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." (See the form of the notice given in Chit. Forms, 9th ed. 827.)

portunity of making or offering such apology, the action having been commenced before there was an opportunity of making or offering such apology].

To Mr. *C. D.* plaintiff's attorney or agent. Yours, etc.,
G. H. defendant's attorney [*or* agent].

Plea of an Apology and Payment into Court to an Action for a Libel contained in a public Newspaper. (6 & 7 *Vict. c.* 96, *s.* 2 (*a*).)

That the alleged libel was contained in a public daily newspaper called the ——, and was inserted in such newspaper without actual malice and without gross negligence; and before [*or* at the earliest opportunity after] the commencement of this action the defendant inserted in such newspaper a full apology for the said libel; and the defendant brings into court the sum of £—— by way of amends for the injury sustained by the plaintiff by the publication of the said libel, and says that the said sum is enough to satisfy the claim of the plaintiff in respect thereof.

Like pleas: O'Brien v. *Clement*, 16 M. & W. 164; *Chadwick* v. *Herapath*, 3 C. B. 885; *Lafone* v. *Smith*, 28 L. J. Ex. 33; 4 H. & N. 158.

(*a*) By the 6 & 7 Vict. c. 96, s. 2, it is enacted "that in an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court (see 3 & 4 Will. IV. c. 42), and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." This enactment is not affected by the C. L. P. Act, 1852, s. 70.

The replication taking issue is sufficient. The plaintiff may also confine his denial to any part of the plea. (See *Chadwick v. Herapath*, 3 C. B. 885.) The above plea will not be allowed together with a plea of not guilty. (*O'Brien* v. *Clement*, 3 D. & L. 676.)

The payment into court under this statute is conditional upon the plea being proved, and if the plea is not proved, the defendant is entitled to take the money out again, and the plaintiff is entitled only to the damages found by the jury. (*Lafone* v. *Smith*, 4 H. & N. 158.)

Detention of Goods, or Detinue.

Plea traversing the Detention (non detinet) (*a*).

That the defendant does not [*or* did not *or* does not nor did, *according to the form of the declaration,*] detain the said goods [*or* deeds *or* writings, *or as the case may be,*] or any of them as alleged.

(*a*) By r. 15, T. T. 1853, "In actions for detaining goods the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea." It is held under this rule that this plea puts in issue the mere fact of a detention adverse to or against the will of the plaintiff, and not its wrongful character. (*Clements* v. *Flight*, 16 M. & W. 42; and see *Mason* v. *Farnell*, 12 M. & W. 674; *Whitehead* v. *Harrison*, 6 Q. B. 423, 429.)

The plea of *non detinet* is not mentioned in the C. L. P. Act, 1852, s. 84 (*ante*, p. 379), as one of those pleas which can be pleaded together without leave of the court or a judge; nor is it mentioned anywhere in the Act or in Sched. B. Since that Act the plea of not guilty has sometimes been pleaded in actions of detinue, and its effect would seem to be the same as that of *non detinet*.

The ordinary evidence of detention is that the defendant refused to deliver the goods when demanded. (*Jones* v. *Dowle*, 9 M. & W. 19.) It is no defence to show that the goods were not in his possession when demanded, if he had improperly parted with the possession, as where he had sold them (*Jones* v. *Dowle*, *supra*), or where he had lost them by carelessness. (*Reeve* v. *Palmer*, 27 L. J. C. P. 327; 28 L. J. C. P. 168; 5 C. B. N. S. 84.) A plea that the defendant tendered and offered to deliver up the goods to the plaintiff, who refused to receive them, was held bad on special demurrer, as being an argumentative plea of *non detinet*. (*Clements* v. *Flight*, 16 M. & W. 42.) The defendant may show under this issue that the goods were delivered by him to a third person with the plaintiff's consent. (*Anderson* v. *Smith*, 29 L. J. Ex. 460.) So it would seem that the defendant might give in evidence any matter showing that the detention was not adverse.

All matters tending to show that the adverse detention is rightful or justifiable must be specially pleaded. The defendant cannot, generally, under the plea of *non detinet* enter into the question of title (*Mason* v. *Farnell*, 12 M. & W. 674); or assert title in himself or justify the detention under the title of another (*Richards* v. *Frankum*, 6 M. & W. 420); or set up a lien (*Barnewall* v. *Williams*, 7 M. & G. 403); or a joint ownership in himself. (*Mason* v. *Farnell*, *supra*.) But in an action of detinue brought by the assignees of a bankrupt the defendant was allowed to prove under this plea that he acted, in selling the goods, under the authority of the solvent partner of the bankrupt. (*Morgan* v. *Marquis*, 9 Ex. 145.)

After the passing of the C. L. P. Act, 1854, s. 78, it was held that payment into court could not be made in respect of a claim for a return of the goods. (*Allan* v. *Dunn*, 26 L. J. Ex. 185; 1 H. & N. 572.) But such payment might be made in respect of the plaintiff's claim for damages for the detention of the goods as distinct from the claim for their return. (*Crossfield* v. *Such*, 8 Ex. 159, where see a plea to that effect.) Now by the C. L. P. Act, 1860, s. 25, "In any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect to the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of 'The

Plea traversing the Plaintiff's Property in the Goods (*a*).

That the said goods [*or* deeds, *or* writings, *as the case may be*] were not nor was any of them the plaintiff's as alleged.

Plea that the goods had been delivered to the defendant by the plaintiff and others, joint owners with him, and that they had not demanded the re-delivery of the said goods: Atwood v. *Ernest*, 13 C. B. 881.

Plea that the defendant delivered up the goods and the plaintiff accepted them after action brought, and payment into court of damages for the detention: Crossfield v. *Such*, 8 Ex. 159.

Pleas of lien, see post, "Lien," p. 625.

DISCLAIMER OF TITLE. See *post*, "*Tender of Amends*," p. 666.

DISTRESS.

Plea of the General Issue by Statute (*b*).

By statute 11 Geo. II. c. 19, s. 21, Public Act.	That he is not guilty.

Common Law Procedure Act, 1852;' and the like proceedings may be had and taken thereupon as to costs and otherwise."

(*a*) The plaintiff's property in the goods detained, if denied, must be traversed specifically. A right of lien must be specially pleaded. (Co. Lit. 283 *a*; *Mason* v. *Farnell*, 12 M. & W. 674, 683; *Barnewall* v. *Williams*, 7 M. & G. 403.)

(*b*) By 11 Geo. II. c. 19, s. 21, "In all actions of trespass, or upon the case brought against any person entitled to rents or services of any kind, or his bailiff or receiver, or other person, relating to any entry by virtue of this Act or otherwise upon the premises chargeable with such rent or services, or to any distress or seizure, sale, or disposal of any goods thereupon, it shall be lawful for the defendant in such actions to plead the general issue, and give the special matter in evidence." (See *ante*, "*General Issue by Statute*," p. 596; and the r. 21, T. T. 1853, there cited.)

In actions for illegal and irregular distresses for rent (*ante*, p. 275), this plea puts in issue all matters of inducement, as the tenancy and the distress, and also the irregularities complained of, and admits proof of all matters of justification. (*Williams* v. *Jones*, 11 A. & E. 643.)

In actions for trespasses to land, or for the taking, conversion, or detention of goods, the general issue by statute enables the defendant to prove a justification under a distress; and every justification at common law or by statute, arising out of the distress, may be given in evidence, and need not be pleaded specially. (*Eagleton* v. *Gutteridge*, 11 M. & W. 465.) It was sometimes the practice formerly to plead the justification specially, as it tended to narrow the issue and enabled the plaintiff to obtain admissions on the record; but now, as the plaintiff can deny the whole plea, this advantage is no longer obtained by pleading specially. The terms of the statute do not extend to a case where the goods have been fraudulently removed, and the distress has been made elsewhere than on the premises out

Plea justifying entering into a House to take Goods which had been clandestinely removed there to avoid a Distress. (11 *Geo. II. c.* 11, *s.* 1.)

That before the alleged trespasses *J. K.* held certain premises as tenant thereof to the defendant under a demise, at a certain yearly rent thereby reserved payable by equal [quarterly] payments, and £—— of the said rent for —— quarters of a year of the said tenancy was then due and in arrear from the said *J. K.* to the defendant; and the said *J. K.* had then and whilst the said rent was so due and in arrear fraudulently and clandestinely carried off from the said premises so demised to him as aforesaid certain goods of the said *J. K.* to prevent the defendant from distraining the same for the said arrears of rent so due as aforesaid, and placed the said goods in the said messuage of the plaintiff, against the statute in such case made and provided; whereupon the defendant, whilst the said arrears of rent remained so due as aforesaid, and within the space of thirty days next ensuing such carrying off of the said goods as aforesaid, entered into the said messuage of the plaintiff (the outer door thereof being then open), in order to take and seize, and there then took and seized, the said goods there being found as a distress for the said arrears of rent, which are the alleged trespasses.

Like pleas: Fletcher v. *Marillier*, 9 A. & E. 457; *Norman* v. *Wescombe*, 2 M. & W. 349; *Angell* v. *Harrison*, 17 L. J. Q. B. 25; *Dibble* v. *Bowater*, 2 E. & B. 564.

Plea justifying the breaking open of the house of the plaintiff to take goods clandestinely removed to avoid a distress, under the 7th section of the same statute: Bowler v. *Nicholson*, 12 A. & E. 341.

Plea, by a carrier, justifying the non-delivery of goods of the plaintiff by reason that the plaintiff had clandestinely removed them from his premises to avoid a distress and delivered them to the defendant, and that the plaintiff's landlord seized them as a distress: Anderson v. *Midland Ry. Co.*, 30 L. J. Q. B. 94.

Plea justifying taking goods as a distress for toll, under the Railway Clauses Consolidation Act, 1845, 8 *Vict. c.* 20: *Field* v. *Newport Ry. Co.*, 27 L. J. Ex. 396; 3 H. & N. 409.

Plea justifying seizing Cattle as a Distress damage feasant.

That at the time of the alleged trespasses the defendant was lawfully possessed of a close, situate in the county aforesaid [*or* of ——], and because the said cattle were then wrongfully in the said close doing damage there to the defendant, the defendant seized and took the said cattle in the said close and impounded the same in a pound overt in the said county, and not above three miles distant from the

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of which the rent issues; and in such case the defence must be specially pleaded.

By s. 20 of the above statute, 11 Geo. II. c. 19, no tenant or lessee shall recover in any action for any unlawful act or irregularity in making or disposing of a distress if tender of amends has been made by the party distraining before such action brought. And by s. 21, the defendant may give such tender in evidence under the general issue.

place where they were so seized and taken, as a distress for the said damage, which are the alleged trespasses.

Like pleas: Wilder v. *Speer*, 8 A. & E. 547; *Weeding* v. *Aldrich*, 9 A. & E. 861.

A like plea in respect of the defendant's right of common: Richards v. *Fry*, 7 A. & E. 698.

A like plea justifying taking cattle depasturing on a spot where the defendant had a sole right of pasturage: Welcome v. *Upton*, 5 M. & W. 398; 6 M. & W. 536; *Jones* v. *Richard*, 5 A. & E. 413.

A like plea justifying taking a dog: Bunch v. *Kennington*, 1 Q. B. 679.

A like plea justifying taking a locomotive engine damage feasant on the defendant's railway: Ambergate Ry. Co. v. *Midland Ry. Co.*, 2 E. & B. 793.

Plea of a Distress Damage Feasant, and a Sale of the Distress to pay for its Keep in the Pound, under the 17 & 18 *Vict. c.* 60.

That at the time of the alleged seizing and taking of the said [horse] the defendant was lawfully possessed of a close situate in the county aforesaid [*or* of ——], and because the said [horse] was then wrongfully in the said close, doing damage there to the defendant, the defendant seized and took the said [horse] as a distress for the said damage in the said close; and, thereupon, after the passing of the statute passed in the Session of Parliament holden in the seventeenth and eighteenth years of the reign of her present Majesty, entitled "An Act to amend an Act of the twelfth and thirteenth years of her present Majesty for the more effectual prevention of cruelty to animals," the defendant impounded the said [horse] as such distress as aforesaid in a pound overt in the said county, and not above three miles distant from the place where the said [horse] was so seized and taken; and afterwards, whilst the said [horse] remained so impounded as aforesaid, the defendant provided and supplied a sufficient quantity of fit and wholesome food and water for and to the said [horse], and instead of proceeding for the recovery of the value of the said food and water of and from the owner of the said [horse] according to the provisions of the said Act in that behalf, the defendant, after the expiration of seven clear days from the time of impounding the said [horse] as aforesaid, thought fit to sell, and then sold the said [horse] openly at a certain public market, in the market-place of ——, after having given three days previously to such sale a public printed notice thereof, for the sum of £——, being the most money that could be got for the same, which are the alleged trespasses; and the defendant then applied [so much as was necessary in that behalf of] the said money, being the produce of the said sale, in discharge of the value of such food and water so supplied as aforesaid, and the expenses of and attending such sale, according to the said statute [and rendered, £——, being the overplus of the produce of the said sale to the plaintiff as and being the owner of the said [horse] *or* tendered and offered to render to the plaintiff, as and being the owner of the said [horse], £——, being the overplus of the produce of the said sale, which the plaintiff refused to accept; and the plaintiff now brings into court the said £——, ready to be paid to the plaintiff].

A like plea justifying a sale of the cattle to pay for their keep in the pound, under 5 *&* 6 *Will. IV. c.* 59, *s.* 4: *Layton* v. *Hurry*, 8 Q. B. 811; *and see Mason* v. *Newland*, 9 C. & P. 575. [*This statute was repealed and its provisions substantially reenacted by the* 12 & 13 *Vict. c.* 92, *except as to the power of sale; the power of sale was given by the* 17 *&* 18 *Vict. c.* 60, *s.* 1.]

Replications to a plea of a distress taken damage feasant: (*a*)

Traversing the defendant's property in the close: Bond v. *Downton*, 2 A. & E. 26. [*The plaintiff may deny this by a replication taking issue.*]

That the plaintiff had a right of common pur cause de vicinage: Jones v. *Robin*, 10 Q. B. 581; *Prichard* v. *Powell*, 10 Q. B. 589; *Clarke* v. *Tinker*, 10 Q. B. 604,

That the defendant himself drove the cattle on to the close: Lyons v. *Martin*, 8 A. & E. 512.

That the cattle and goods were at the time of the seizure in the actual possession and under the personal care of the plaintiff: Field v. *Adames*, 12 A. & E. 649; *and see Bunch* v. *Kennington*, 1 Q. B. 679.

That the pound was an improper pound: Wilder v. *Speer*, 8 A. & E. 547.

That the cattle strayed on to the defendant's close by reason of the fences being out of repair, and the defendant distrained them before the plaintiff could remove them: Goodwyn v. *Cheveley*, 28 L. J. Ex. 298; 4 H. & N. 631; *and see "Fences," ante, p.* 286.

See other pleas and replications in respect of distresses, post, "Replevin," p. 657, 658.

Easements.

See "*Common*," *ante*, p. 602; "*Lights*," *post*, p. 629; "*Support*," *post*, p. 664; "*Ways*," *post*, p. 683.

Equitable Pleas.

See *ante*, p. 485; *post*, 630.

(*a*) Any irregularity in the treatment of a distress damage feasant makes the party distraining a trespasser *ab initio*, and may be replied so as to entitle the plaintiff to recover for the whole trespass. The statute 11 Geo. II. c. 19, s. 19, applies only to distresses for rent: see *ante*, p. 280; and *post*, p. 637.

Tender after impounding does not render the distress or detention wrongful, and a replication of such tender to a plea of distress damage feasant is bad. (*Singleton* v. *Williamson*, 31 L. J. Ex. 287.) And see, as to the effect of tender, *ante*, p. 277.

ESTOPPEL.

Replication to a Plea traversing the Plaintiff's Title to Land, an Estoppel by a Judgment in Ejectment (a).

[*Commence with the form ante, p. 264, restricting the replication to so much of the plea as relates to the trespasses complained of since the date of the claim in the writ of ejectment.*] That on the day and year last aforesaid the plaintiff, for the purpose of recovering possession of the said land, sued out of the court of —— a writ of ejectment, directed to the defendant by name, being the person then in possession of the said land, and to all persons entitled to defend the possession of the said land, to the possession whereof the plaintiff by the said writ claimed to be then entitled and to eject all other persons therefrom, commanding the defendant and the said persons entitled to defend the possession of the said land, or such of them as denied the alleged title of the plaintiff within sixteen days after service of the said writ to appear in the said court of —— to defend the said property or such part thereof as they might be advised, in default whereof judgment might be signed and they turned out of possession; and such proceedings were thereupon had in the said court upon the said writ that before this suit by the judgment of the said court it was considered that the plaintiff should recover the possession of the said land; and afterwards and before this suit by virtue of the said judgment the plaintiff entered into possession of the said land. [*Conclude as ante, p. 264.*]

Like replications: Doe v. *Wellsman*, 2 Ex. 368; *Wilkinson* v. *Kirby*, 15 C. B. 433, 430.

EXECUTION. See *post* "*Process*," p. 648.

EXECUTORS. See *ante*, "*Executors*," p. 283 (*b*).

(*a*) See the observations on "*Estoppel*," *ante*, p. 491.

This replication may be pleaded to pleas disputing the plaintiff's property in the land; as pleas that the land is not the plaintiff's, or *liberum tenementum* in actions of trespass to land and in actions to recover mesne profits. The judgment is no estoppel unless pleaded. (*Emerson* v. *Feversham*, 11 Ex. 385; *Matthew* v. *Osborne*, 13 C. B. 919; *Litchfield* v. *Ready*, 5 Ex. 939, 945.) The estoppel dates from the date of the claim in ejectment, and therefore should not be pleaded in respect of any antecedent period; and the matter of estoppel is assumed to continue until the contrary is shown. The defendant may deny the matter of estoppel or may set up any subsequent matter showing that the estoppel has ceased. (*Wilkinson* v. *Kirby*, 15 C. B. 430, 440.)

(*b*) In an action brought by an administrator under Lord Campbell's Act, 9 & 10 Vict. c. 93, for the death of the intestate caused by the negligence of the defendant, to recover compensation for the family, a plea that

Fishery.

Plea, to an action of trespass, justifying the trespass under a prescriptive right of fishing: Mannall v. *Fisher*, 5 C. B. N. S. 856.

Plea, to an action of trespass, of a public right of fishing in an arm of the sea: Replication of a prescriptive right of sole fishery in the same spot: Richardson v. *Orford*, 2 H. Bl. 182.

Fixtures. See *post* "*Reversion*," p. 661; "*Waste*," p. 680.

Fraud.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

General Issue, *ante*, p. 589.

Highways. See *ante*, p. 293.

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the family did not suffer any pecuniary loss, was allowed to be added at the trial in addition to the plea of not guilty. (*Duckworth* v. *Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25.) The plaintiff in such action is not entitled to a verdict for nominal damages upon proof merely of the death by negligence, without proof of actual pecuniary loss to the family. (*Ib.*; and see *ante*, p. 284; and *post*, p. 634.)

(*a*) In actions for fraud the plea of not guilty denies that the defendant made the representation charged, that it was false, that the defendant knew it to be false or did not believe it to be true, that the defendant intended to induce the plaintiff to act upon it, that the plaintiff did so, and that damage happened to him in consequence. (*Mummery* v. *Paul*, 1 C. B. 316; *Rawlings* v. *Bell*, 1 C. B. 951; *Freeman* v. *Cooke*, 2 Ex. 654; *Eastwood* v. *Bain*, 28 L. J. Ex. 74; *Cornish* v. *Abington*, 28 L. J. Ex. 262; 4 H. & N. 549; and see *ante*, p. 289.) Matters of inducement stating the circumstances under which the representation was made must be separately traversed, unless they are involved in the statement of the fraud. (Ib.) A special plea to an action for fraud that the defendant had good and probable reason to believe and did believe the representation to be true, was held a good answer to the action. (*Evans* v. *Collins*, 5 Q. B. 804.) Such defence may be proved under the general issue.

In actions founded on false representations respecting the character or credit of another, objections under the statute 9 Geo. IV. c. 14, s. 6 (see *ante*, p. 293), should be relied on under the general issue; and a plea to the effect that the representations were not in writing as required by the statute is unnecessary. (*Turnley* v. *Macgregor*, 6 M. & G. 46.)

HUSBAND AND WIFE.

See *ante*, p. 294; "*Abatement*," p. 408.

Plea of not guilty in an action against husband and wife for a tort committed by the wife: ante, p. 591.

IMPRISONMENT. See *post*, "*Trespass to the Person*," p. 666.

INFANCY. See *ante*, "*Infancy*," pp. 5, 386.

INNKEEPER. See *ante*, "*Innkeeper*," p. 298.

JUDGMENT RECOVERED (*a*).

Plea, to an action for negligent navigation, of a judgment against the plaintiff in the Admiralty Court respecting the same cause of action: Harris v. *Willis*, 15 C. B. 710.

Plea, to an action for negligent navigation, of a foreign judgment against the plaintiff in respect of the same grievances: General Steam Navigation Co. v. *Guillou*, 11 M. & W. 878.

Plea of a judgment recovered against a co-trespasser for the same trespasses: Basham v. *Lumley*, 3 C. & P. 489 *n.* (*a*) (*b*).

Plea, in an action for a conversion of goods, that the conversion

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(*a*) The form of this plea is the same as in actions on contracts (see "*Judgment recovered*," *ante*, p. 531); the precedents there given may be made applicable with trifling alterations according to the circumstances of the case.

A judgment recovered by the plaintiff merges the cause of action, and may be pleaded as a defence to another action for the same cause. A judgment against the plaintiff operates as an estoppel to his suing again for the same cause, and may be so pleaded. (See *ante*, pp. 491, 533.)

A judgment recovered by the plaintiff in a foreign court does not merge the cause of action, and is no defence to an action here. A final judgment in a foreign court against the plaintiff is an estoppel to his suing here for the same cause of action. (*Plummer* v. *Woodburne*, 4 B. & C. 625; *General Steam Navigation Co.* v. *Guillou*, 11 M. & W. 877; and see as to Foreign Judgments, Westlake's International Law, ch. xii., *ante*, p. 530, 533.)

As to the replication denying the judgment and a new assignment that the plaintiff is suing for different causes of action, see *ante*, p. 534.

(*b*) A judgment recovered against one of several joint wrong-doers is,

was committed by the defendant jointly with another, and a judgment recovered by the plaintiff against the latter for the same conversion: Buckland v. *Johnson*, 15 C. B. 145.

Plea, to an action for the conversion of goods, that the plaintiff recovered judgment in an action for the conversion of the same goods against a third party from whom the defendant purchased them: Cooper v. *Shepherd*, 3 C. B. 266; *and see ante*, "*Conversion*," *p.* 608.

Pleas of justification under judgment and execution; see post, "*Process*," *p.* 648.

Justice of the Peace.

See "*Justice of the Peace*," *ante, p.* 300; "*General Issue by Statute*," *ante, p.* 596; "*Limitation*," *post, p.* 630; "*Notice of Action*," *post, p.* 639; "*Payment into Court*," *post*, p. 646; "*Tender of Amends*," *post, p.* 665.

Landlord and Tenant. See *post*, "*Replevin*," p. 654.

Leave and Licence (*a*).

Plea of Leave and Licence. (*C. L. P. Act*, 1852, *Sched. B.* 44.)

That he did what is complained of by the plaintiff's leave.

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without execution or satisfaction, a bar to an action against the others for the same cause. (*Brown* v. *Wooton*, Yelv. 67; Cro. Jac. 73; recognized in *King* v. *Hoare*, 13 M. & W. 494, 504.)

(*a*) *Leave and licence.*]—In actions for wrongs independent of contract, the leave and licence of the plaintiff to do the act complained of shows that it is not injurious, and constitutes a defence to an action according to the maxim of law *volenti non fit injuria*.

This defence may be given in evidence under the general issue in actions for assault, and it seems for false imprisonment (*Christopherson* v. *Bare*, 11 Q. B. 473); in actions for the conversion of goods (see *Ringham* v. *Clements*, 12 Q. B. 260); and, it would seem, in actions for the detention of goods. (See *Clements* v. *Flight*, 16 M. & W. 42.)

In actions for trespasses to land and realty, the defence of leave and licence must be pleaded. (*Kavanagh* v. *Gudge*, 7 M. & G. 316.) A mere licence to enter upon land whether given by parol or by deed is revocable. (*Wood* v. *Leadbitter*, 13 M. & W. 838, 845; *Adams* v. *Andrews*, 15 Q. B. 284; *Coleman* v. *Foster*, 1 H. & N. 37.) A licence incident to or connected with a valid grant is irrevocable whether made by parol or by deed. (*Wood* v. *Leadbitter*, 13 M. & W. 838, 845.) A grant of an interest in land cannot be made by parol except in the case of leases not exceeding three years

Replication of a Revocation of the Leave (*a*).

That before any of the alleged trespasses [*or* grievances] the plaintiff revoked the alleged leave, whereof the defendant then had notice.

LIBERUM TENEMENTUM. See *post*, "*Trespass to Land*," p. 676.

LIEN (*b*).

Plea of a Lien by a Workman for Work done upon Goods (*c*).

That before the alleged detention the plaintiff delivered the said goods to the defendant for the purpose of their being repaired for

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within the second section of the Statute of Frauds. (See *ante*, p. 171 (*b*).) A grant of emblements, growing crops, or other similar chattel interests, falls either within the 4th or the 17th sections of the Statute of Frauds, and a licence incident to such grants when validly made may be irrevocable. (*Ib.*; *Wood* v. *Manley*, 11 A. & E. 34.) A grant of an interest in land, as a lease for a term, is not properly described as a licence, although it necessarily contains a licence commensurate with the grant. A defendant justifying under such an interest should not plead leave and licence, but should plead the interest according to its legal effect, as a lease or otherwise. (*Kavanagh* v. *Gudge*, 7 M. & G. 316, 320.)

Acquiescence in the erection of a nuisance to the plaintiff's property may be pleaded as a defence on equitable grounds. (*Davies* v. *Marshall*, 10 C. B. N. S. 697; 31 L. J. C. P. 61; and see *Bankart* v. *Houghton*, 28 L. J. C. 473; *Cooper* v. *Hubbuck*, 13 L. J. C. 123.)

(*a*) When the plea is in a general form this replication is unnecessary, as the revocation of the licence may be shown under a replication taking issue (*Barnes* v. *Hunt*, 11 East. 451; *Adams* v. *Andrews*, 15 Q. B. 284); but it might always have been replied specially. (*Ib.*; and see per Tindal, C. J., *Feltham* v. *Cartright*, 5 Bing. N. C. 569, 572.)

Under the general plea of leave and licence the defendant is bound to prove a licence co-extensive with all the acts proved by the plaintiff. If the licence covers some of those acts, but not others, the plaintiff is not bound to new assign, but may take issue generally, and recover damages for the acts not covered by the licence. (*Adams* v. *Andrews*, 15 Q. B. 284, 291.)

(*b*) The defence of lien should be specially pleaded in actions for the detention of goods. (Co. Lit. 283 a; *Mason* v. *Farnell*, 12 M. & W. 674, 683; *Barnewall* v. *Williams*, 7 M. & G. 403; and see *ante*, p. 617.)

In an action for a wrongful conversion of goods lien may be proved under a plea traversing the property in the goods (*Owen* v. *Knight*, 4 Bing. N. C. 54; *Brandao* v. *Barnett*, 1 M. & G. 908; *Richards* v. *Symons*, 8 Q. B. 90); and in such an action a special plea asserting a lien was formerly objectionable as amounting to an argumentative traverse. (*Dorrington* v. *Carter*, 1 Ex. 566; *Jackson* v. *Cummins*, 5 M. & W. 342, 349; and see *ante*, p. 607.)

(*c*) Where a bailee has expended his labour and skill on goods delivered to him for that purpose, he has a lien at common law for his charge for the work. Thus the artificer to whom goods are delivered for the purpose of being worked up into form, and the farrier by whose skill an animal is cured of a disease, and the horsebreaker by whose skill he is rendered manageable, have liens on them in respect of their charges. (*Scarfe* v. *Morgan*, 4 M. &

the plaintiff by the defendant in the way of his trade of a —— for reward to the defendant, and the defendant received and had the said goods for the purpose and on the terms aforesaid, and repaired the same and found the necessary materials in that behalf for the plaintiff; and the reasonable reward for the same, payable by the plaintiff to the defendant at the time of the alleged detention, amounted to £——, whereof the plaintiff then had notice, but did not pay the same, and the said sum being still due and unpaid, the defendant detained [and still detains] the said goods for a lien and security for the said £——, which is the alleged detention.

Another Form of a Plea of Lien for Work done on Goods.

That at the time of the alleged detention he had a lien upon the said goods for money payable to him by the plaintiff for work done and materials provided by the defendant in repairing the said goods for the plaintiff at his request, and the said money being still due and unpaid, the defendant detained [and still detains] the said goods for a lien and security for the said money, which is the alleged detention.

W. 270, 283.) A carriage-maker has a lien for the repairs done to a carriage delivered to him to be repaired. (*Green* v. *Shewell*, cited 4 M. & W. 277.) The keeper of a stallion has a lien on a mare sent to him to be covered. (*Scarfe* v. *Morgan*, 4 M. & W. 270.) A trainer of racehorses has a lien for his charge for keeping and training them. (*Bevan* v. *Waters*, Mo. & M. 235.) But if the owner expressly stipulated for the possession of his horse when required, the trainer has no lien. (See *Scarfe* v. *Morgan*, 4 M. & W. 270, 284; *Jackson* v. *Cummins*, 5 M. & W. 342, 350.) So a livery stable keeper has no lien for the keep of a horse, because the owner impliedly, if not expressly, stipulates for the possession when required. (*Judson* v. *Etheridge*, 1 C. & M. 743.) And, in like manner, an agister of cattle has no lien, because the nature of the bailment is inconsistent with a detention by him. (*Jackson* v. *Cummins*, 5 M. & W. 342.)

The work and skill for which the lien is created must be expended upon the goods themselves, as in the above examples, and as those expended in assaying gold or jewels, or weighing or carrying goods. (See per Pollock, C. B., *Steadman* v. *Hockley*, 15 M. & W. 553, 556.) Work and skill expended "with and in respect of" the goods is not sufficient, as where a conveyancer transacted business "with and in respect of" deeds, it was held that he could not claim a lien upon the deeds for his charges for the business. (*Steadman* v. *Hockley*, *supra*.)

Where several parcels of goods are delivered under one contract for the purpose of having work done upon them, the bailee has a lien on the whole for the whole price, though the goods are delivered at different times. (*Marks* v. *Lahee*, 3 Bing. N. C. 408.) A bailee does not lose his lien by claiming it for other charges besides that for which he is entitled to hold it. (*Scarfe* v. *Morgan*, 4 M. & W. 270.)

By express agreement, or by the usage of particular trades or professions, a lien may be created for the general balance of account between the parties; thus an attorney has a lien for his general balance on the deeds and papers of his clients which have come to his hands in the course of his employment (See 1 Chit. Pr. 11th ed. 133); a banker has a general lien upon the securities of his customer (*Davis* v. *Bowsher*, 5 T. R. 488; *Barnett* v. *Brandao*, 6 M. & G. 630); and a factor has a general lien upon all goods consigned to him as factor (*Dixon* v. *Stansfeld*, 10 C. B. 398.)

Plea of Lien by a Common Carrier.

That at the time of the alleged detention he had a lien upon the said goods for money payable to him by the plaintiff for the conveyance of the said goods by him, as and being a common carrier, for the plaintiff at his request from divers places to divers other places, and the said money being still due and unpaid, the defendant detained [and still detains] the said goods for a lien and security for the said money, which is the alleged detention.

A like plea by a coachmaker: Pinnock v. *Harrison*, 3 M. & W. 532; *by a fuller of cloth: Coombs* v. *Noad*, 10 M. & W. 127; *Cumpston* v. *Haigh*, 2 Bing. N. C. 449; *by an engraver: Marks* v. *Lahee*, 3 Bing. N. C. 408; *by a carver and gilder: Legg* v. *Evans*, 6 M. & W. 36; *by a warehousekeeper: Leuckhart* v. *Cooper*, 3 Bing. N. C. 99.

Plea of Lien by an Attorney.

That before the alleged detention the plaintiff delivered the said deeds, papers and instruments in writing to the defendant as and being an attorney of the Court of ——, at Westminster, and a solicitor of the High Court of Chancery, for the purpose of certain affairs and business to be done and carried on for the plaintiff by the defendant as such attorney and solicitor as aforesaid upon and with the same and in respect of the property to which they related and otherwise for reward to the defendant, and the defendant received and had the said deeds, papers and instruments in writing for the purpose and on the terms aforesaid; and the plaintiff at the time of the alleged detention was and still is indebted to the defendant in a large sum of money for work, journeys, and attendances of the defendant, by him done, performed and bestowed as the attorney and solicitor of the plaintiff and upon his retainer, and for fees payable by the plaintiff to the defendant in respect thereof, and for materials and necessary things provided in and about the said work, and for money paid for the plaintiff by the defendant as the attorney and solicitor of the plaintiff and at his request, wherefore the defendant detained and still detains the said deeds, papers, and instruments in writing, for a lien and security for the said money, which is the alleged detention.

A like plea: Lightfoot v. *Keane*, 1 M. & W. 745.

Plea by bankers of a general lien on goods and securities deposited with them: O'Connor v. *Marjoribanks*, 4 M. & G. 435; *Barnett* v. *Brandao*, 6 M. & G. 630.

Plea by an accountant of a lien upon ledgers, account-books, etc.: Atwood v. *Ernest*, 13 C. B. 881.

Plea by an insurance broker of a lien on a policy of insurance for a balance of account: Hewison v. *Guthrie*, 2 Bing. N. C. 755.

Plea of lien by a pawnbroker for money advanced upon goods: Nickisson v. *Trotter*, 3 M. & W. 130 (*a*).

(*a*) A pledge of goods creating a lien for money lent within the Pawnbrokers' Act, 39 & 40 Geo. III. c. 99 (a statute amended as to some of its

Plea, to a Count for the Detention of Deeds, that they were deposited as Security for a Debt.

That before the alleged detention the plaintiff deposited the said deeds and instruments in writing with the defendant, to be by him kept as a pledge and security for and until the repayment by the plaintiff to the defendant of £——, then lent by the defendant to the plaintiff upon the security of the said deeds and instruments in writing, and the defendant received and had the same for the purpose and on the terms aforesaid; and at the time of the alleged detention the said £—— was and still is due and unpaid to the defendant, wherefore the defendant detained [and still detains] the said deeds and instruments in writing, which is the alleged detention.

Like pleas: Gledstane v. *Hewitt*, 1 C. & J. 565; *Chilton* v. *Carrington*, 15 C. B. 95; *Owen* v. *Nickson*, 30 L. J. Q. B. 125.

Plea of Lien and Pledge by an Agent entrusted with Goods: under 5 & 6 Vict. c. 39 (a).

That before the alleged detention and after the passing of the statute made in the sixth year of the reign of her Majesty Queen Victoria, to amend the law relating to advances *bonâ fide* made to agents entrusted with goods, *J. K.* was an agent within the meaning of the said statute, and was, as such agent, entrusted with the possession of the said goods by the plaintiff [*or L. M.* the then owner thereof], the same being goods within the meaning of the said statute; and the said *J. K.*, being so entrusted with the possession of the said goods as such agent as aforesaid, then deposited the same with the defendant under and in pursuance of a contract or agreement by way of pledge, lien and security then *bonâ fide* made by the defendant with the said *J. K.* for a loan, advance or payment of £——, then made by the defendant to the said *J. K.* upon the security of the said goods, [and for interest thereon, at the rate of £—— per cent. payable by the said *K. L.* to the defendant from the time of the said advance until the repayment of the said £——,] and the defendant then received and had the said goods for the purpose and on the terms aforesaid; and at the time of the alleged detention the said £—— [and interest thereon as aforesaid] was and still is [*or* were and still are] due and unpaid to the defendant, wherefore the defendant detained [and still detains] the said goods, which is the alleged detention.

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provisions by the 9 & 10 Vict. c. 98, and the 19 & 20 Vict. c. 27), must be made in conformity with the requirements of that Act. (*Fergusson* v. *Norman*, 5 Bing. N. C. 76; *Attenborough* v. *London*, 8 Ex. 661.)

(*a*) The statute applies only to commercial agents. (*Lamb* v. *Attenborough*, *supra*.) Replications to the above plea, that the plaintiff was induced to intrust the agent with the possession of the goods by the fraud of the agent; that the transaction between the agent and the defendant was not in the usual course of business; that the goods were delivered to the defendant to replace other goods on which he held a lien, but which were not the goods of the agent, were held bad. (*Sheppard* v. *Union Bank of London*, *supra*.) See also the statutes 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; and, as to the effect of the Factor's Acts, Chit. on Contr. 6th ed. 202.

Like pleas: Lamb v. *Attenborough*, 31 L. J. Q. B. 41; *Sheppard* v. *Union Bank of London*, 31 L. J. Ex. 154.

Replication of a Tender of the Debt.

That before the detention in the declaration mentioned the plaintiff tendered and offered to pay to the defendant £——, in satisfaction and discharge of the alleged lien, such last-mentioned sum being sufficient to satisfy and discharge the same, and the plaintiff then requested the defendant to deliver up to the plaintiff the said goods, which the defendant refused to do.

Like replications: Marks v. *Lahee*, 3 Bing. N. C. 408; *Coombs* v. *Noad*, 10 M. & W. 127.

Lights.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Possession of the House.

That the plaintiff was not possessed of the said dwelling-house as alleged.

Plea traversing the Plaintiff's Right to the Light.

That the plaintiff was not entitled to have the light and air enter into the said dwelling-house through the said window as alleged.

Plea, in an Action by a Reversioner, traversing the Plaintiff's Right to the Light (*b*).

That there were not nor was of right in the said dwelling-house the said windows, or any of them, through which the light and air of right ought to have entered as alleged.

Plea justifying the obstruction, as having been erected under the powers of a Railway Act: Turner v. *Sheffield Ry. Co.*, 10 M. & W. 425.

Plea on equitable grounds, to an action for obstructing the plain-

(*a*) The general issue, not guilty, denies the alleged obstruction only (r. 16, T. T. 1853). The plaintiff's possession of the house, and his right to the lights, must, if denied, be traversed specifically. Matters justifying the obstruction must be pleaded specially.

(*b*) By the Prescription Act, 2 & 3 Will. IV. c. 71, s. 5, under a denial of the general allegation of the right, all the matters in that Act mentioned and provided, which are applicable to the case, are admissible in evidence to sustain or rebut such allegation. (See *ante*, p. 603, and see further as to Lights, *ante*, p. 204.)

tiff's lights by a building, that the defendant erected the building at a great expense, with the knowledge, acquiescence and consent of the plaintiff: Davies v. *Marshall,* 10 C. B. N. S. 697; 31 L. J. C. P. 61; *and see ante, p.* 625, *n.*

Replication on equitable grounds that the plaintiff acquiesced and consented upon the faith of false representations of the defendant that the building would not cause the obstruction: Ib.; and see Bankart v. *Houghton,* 28 L. J. C. 473; *Cooper* v. *Hubbuck,* 31 L. J. C. 123.

Plea justifying an Entry on the Plaintiff's Land to remove an Obstruction to the Defendant's ancient Lights.

That at the time of the alleged trespasses the defendant was possessed of an ancient dwelling-house adjoining the said close of the plaintiff, and by reason thereof was entitled to have the light and air enter into the said dwelling-house through a certain ancient window therein; and because the said building in the said close wrongfully obstructed the light and air, and prevented the same from entering into the said dwelling-house through the said window, the defendant entered the said close of the plaintiff and pulled down the said building in order to remove the said obstruction, doing no more than was necessary for that purpose, which are the alleged trespasses.

A like plea: Thompson v. *Eastwood,* 8 Ex. 69.

LIMITATION, STATUTES OF (*a*).

Plea of the Statute of Limitations. (*C. L. P. Act,* 1852, *Sched. B.* 39.)

That the alleged cause of action did not accrue within six [*or* four, *or* two, *or as the case may be*] years [*or* —— months, *according to the period of limitation*] before this suit.

(*a*) *Limitation of actions for wrongs.*]—The principal enactments respecting the limitation of actions for wrongs are the following:—

By the 21 Jac. I. c. 16, s. 3, all actions upon the case (other than for slander), actions for trespass, detinue, and replevin for goods or cattle, and trespass *quare clausum fregit,* must be commenced within *six* years next after the cause of such actions and not after. Actions of trespass, of assault, battery, wounding, and imprisonment, within *four* years next after the cause of such actions and not after. Actions upon the case for words within *two* years next after the words spoken and not after. In the case of a plaintiff being under the disabilities of infancy, coverture, etc., the time is to reckon from the ceasing of the disability, by s. 7. As to other disabilities, see 4 & 5 Anne, c. 16; and 19 & 20 Vict. c. 97; cited *ante,* "*Limitation,*" p. 543.

By the 31 Eliz. c. 5, s. 6, actions on penal statutes given to a common informer must be commenced within *one* year. And by the 3 & 4 Will. IV. c. 42, s. 3, actions for penalties given by a statute to the party grieved must be commenced within *two* years after the cause of action accrued.

By the 5 & 6 Vict. c. 97, s. 5, the period within which any action may be brought for anything done under the authority or in pursuance of any

public local and personal, or local and personal acts, or other acts of a local and personal nature, shall be *two* years, and in case of continuing damage then within one year after such damage shall have ceased. This statute does not apply to Acts passed subsequently to its date. (*Boden* v. *Smith*, 18 L. J. C. P. 120.) As to what acts are within the above description, see Ib.; *Cock* v. *Gent*, 12 M. & W. 234; *Richards* v. *Easto*, 15 M. & W. 244; *Moore* v. *Shepherd*, 10 Ex. 424.

By the 3 & 4 Will. IV. c. 42, s. 2 (cited *ante*, p. 284), an action may be maintained by the executors or administrators of a deceased person for injuries to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person. And an action may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves, the administration of the estate and effects of such person.

By the 9 & 10 Vict. c. 93, s. 3, actions brought under that Act to recover compensation for the next of kin for the loss occasioned by the death of persons killed through the acts or default of the defendants must be brought within twelve months after such death. (See *ante*, p. 284.)

Actions for infringement of copyright must be brought within twelve months from the accruing of the cause of action, 5 & 6 Vict. c. 45. (See plea, *Sweet* v. *Benning*, 16 C. B. 459.)

By the statutes 24 & 25 Vict. c. 96 (consolidating the statute law relating to larceny), s. 113, the 24 & 25 Vict. c. 97 (consolidating the statute law relating to malicious injuries to property), s. 71, and the 24 & 25 Vict. c. 99 (consolidating the statute law relating to offences against the coin), s. 33, it is enacted that any action against any person for anything done in pursuance of any of those Acts shall be commenced within six months after the fact committed; and not otherwise; and the defence may be relied on under the general issue "by statute."

See the period of limitation for actions for anything done in pursuance of the Acts relating to the metropolitan police, *ante*, "*Police*," p. 334; under the Highways Act, *ante*, "*Highways*," p. 293; under the County Courts Acts, *ante*, "*County Courts*," p. 261; under the Public Health Act, *ante*, "*Public Health*," p. 336; under the Local Government Act, *ante*, p. 337; under the Metropolis Management Acts, see 25 & 26 Vict. c. 102, s. 106; for actions against justices of the peace, *ante*, "*Justice of the Peace*," p. 301.

The period for claiming a mandamus under the C. L. P. Act, 1854, s. 68, is not limited by any statute. (*Ward* v. *Lowndes*, 29 L. J. Q. B. 40.)

In actions for wrongs the date of the cause of action for the purpose of the limitation of the action is in general the committing of the injurious act, and not the occurrence of the damage arising therefrom. (*Sutton* v. *Clarke*, 6 Taunt. 29; *Nicklin* v. *Williams*, 10 Ex. 259; *Violett* v. *Sympson*, 27 L. J. Q. B. 138; 8 E. & B. 344; 2 Wms. Saund. 63 *e*, n. (*m*).) But where an act is not injurious in itself, but may become so only by reason of future consequences which cannot be foreseen, as where a person excavates his own land in a manner which may cause a subsidence in the land of his neighbour, no right of action accrues until the actual damage occurs; and the limitation dates from the damage. (*Bonomi* v. *Backhouse*, 27 L. J. Q. B. 378; S. C. in error, 28 L. J. Q. B 378; 1 E. B. & S. 622; affirmed in H. L. 7 Jur. N. S. 809; overruling on this point, *Nicklin* v. *Williams*, *supra*.) Where the injurious Act is continuing, and causes continued damage, the right of action is also continuing. (*Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305.)

LOST GRANT. See *post* "*Ways*," p. 685.

MAGISTRATE. See *ante*, "*Justice of the Peace*," p. 624.

MALICIOUS PROSECUTION.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Termination of the Proceedings.

That the said action [*or* prosecution *or* proceedings, *or as the case may be*] was [*or* were] not determined as alleged.

MASTER AND SERVANT.

General Issue (*b*).

"Not guilty," *ante*, p. 589.

It is no answer to a plea of the statute that the cause of action was fraudulently concealed from the plaintiff until within six years before the commencement of the suit; and a replication to that effect is bad, whether pleaded as a legal or an equitable replication. (*Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459; 26 L. J. Ex. 1; see *ante*, p. 486.)

The renewal of liability by subsequent acknowledgment, as in cases of debts (see *ante*, p. 376), is inapplicable in actions for wrongs independent of contract. (*Hurst* v. *Parker*, 1 B. & Ald. 92; *Tanner* v. *Smart*, 6 B. & C. 603, 605.)

Besides the above statutes limiting the period within which actions may be brought, there are statutes of limitation which operate directly upon rights and titles to property, creating or extinguishing them by the lapse of time, as the Prescription Act, 2 & 3 Will. IV. c. 71, see *ante*, p. 171, 423; and the statute 3 & 4 Will. IV. c. 27, relating to real property. In actions for wrongs these enactments are, for the most part, available in evidence under issues respecting the existence of the rights in question, and need not be specially pleaded.

See further as to the Statutes of Limitation, *ante*, p. 542.

(*a*) In an action for a malicious arrest or malicious prosecution, the plea of not guilty puts in issue the arrest or prosecution, the absence of probable cause, and the malice, all which matters must be proved by the plaintiff. (See *ante*, p. 303; *Mitchell* v. *Jenkins*, 5 B. & Ad. 588; *Cotton* v. *Browne*, 3 A. & E. 312; *Hounsfield* v. *Drury*, 11 A. & E. 98.) The termination of the proceedings, which is a necessary and material averment in the declaration (*ante*, p. 303) must, if denied, be specifically traversed, otherwise it would be admitted on the record. (*Watkins* v. *Lee*, 5 M. & W. 270; *Atkinson* v. *Raleigh*, 3 Q. B. 79; *Haddrick* v. *Heslop*, 12 Q. B. 267.)

(*b*) In actions by a master against a third party for injuries done to him

Plea denying the Service (a).

That the said *G. H.* was not the servant of the plaintiff as alleged.

Plea, in an action for an injury done to the plaintiff by the defendant's servant, that the plaintiff was also a servant of the defendant and engaged in the same employment with his fellow-servant who did the injury: Wiggett v. *Fox*, 25 L. J. Ex. 188; 11 Ex. 832; *Griffiths* v. *Gidlow*, 27 L. J. Ex. 404; 3 H. & N. 648.

Plea in a like action that the plaintiff was voluntarily assisting in the same employment with the defendant's servant who did the injury: Degg v. *Midland Ry. Co.*, 26 L. J. Ex. 171; 1 H. & N. 773.

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in respect of his servants, as by enticing away or harbouring his servants or workmen, or for loss of services occasioned by the seduction of his female servant, or by personal injuries done to the servant, the plea of not guilty denies the wrongful act alleged to have been committed, and also the loss or damage sustained by the master in consequence of the act. (*Eager* v. *Grimwood*, 1 Ex. 61; *Davies* v. *Williams*, 10 Q. B. 725; and see *ante*, p. 594.)

The effect of the plea seems not to be varied by the different modes of framing the declaration. Where it contains a substantive averment that a certain person, *G. H.*, was at the time the servant of the plaintiff, and alleges that the defendant beat or seduced *G. H.* (as in the form, *ante*, p. 311), the plea of not guilty admits that *G. H.* was the servant of the plaintiff as alleged, and denies only the act done to *G. H.* and the consequent damage. The averment of the service in such case constitutes matter of inducement, and it is immaterial in what part of the declaration it occurs. (*Torrence* v. *Gibbins*, 5 Q. B. 297; and see *ante*, "*General Issue*," p. 594.) And even where the declaration alleges merely that the defendant beat or seduced the plaintiff's servant, etc., without naming or identifying the person, in like manner as in the form given for criminal conversation in the C. L. P. Act, 1852, Sched. B. 27, the plea of not guilty seems not to deny the relationship of servant, etc. (*Kenrick* v. *Horder*, 7 E. & B. 628.) In such cases, however, it is said that some proof of the identity of the servant must be given under the plea of not guilty. (Per Crompton, J., Ib.; 631; and see *Forman* v. *Dawes*, C. & Mar. 127.)

So in an action by a third party against a master for injuries done by his servant, if the declaration alleges directly that the defendant did the act, or that the defendant by his servant did the act, the plea of not guilty puts in issue that the person who in fact did the act was the servant of the defendant, so as to render the latter responsible. (*Mitchell* v. *Crassweller*, 13 C. B. 237.) But see *Taverner* v. *Little*, 5 Bing. N. C. 678; *Hart* v. *Crowley*, 12 A. & E. 378; *Dunford* v. *Trattles*, 12 M. & W. 529; which show that where the service is stated in the declaration by way of inducement it is not put in issue by the plea of not guilty. See *ante*, "*General Issue*," p. 594; "*Negligence*," p. 635.

In actions by a servant against his master for negligently employing an incompetent fellow-servant, or for negligently providing unsafe materials and implements for the work, the plea of not guilty puts in issue the incompetency of the fellow-servant, the dangerous character of the materials or implements, also the knowledge of the master and the ignorance of the plaintiff of these circumstances, and that the damage to the plaintiff was occasioned thereby, see the cases cited *ante*, p. 314; and see *ante*, p. 594.

(*a*) As to the nature of the service necessary to support this issue in an action for seduction, see *Grinnell* v. *Wells*, 7 M. & G. 1033; *Griffiths* v. *Teetgen*, 15 C. B. 344; *Thompson* v. *Ross*, 29 L. J. Ex. 1; 5 H. & N. 16; *Manley* v. *Field*, 29 L. J. C. P. 79; 7 C. B. N. S. 96.

Special plea in an action by a servant against his master for an injury done by the negligence of a fellow-servant that the latter was a competent person, and that his negligence was without the authority and knowledge of the defendant: Hutchinson v. *York Newcastle and Berwick Ry. Co.*, 5 Ex. 343.

Mischievous Animals.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Negligence.

General Issue (*b*).

"Not guilty," *ante*, p. 589.

(*a*) In an action for having knowingly kept a mischievous animal which injured the plaintiff, the plea of not guilty puts in issue that the defendant kept the animal in question, that the animal was mischievous, that the defendant knew it to be so, and that it did the injury. (*Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 C. B. 622; and see *ante*, p. 316.) Negligence on the part of the defendant in keeping the animal insecurely is no part of the cause of action, and need not be stated in the declaration; the plaintiff is not bound to prove it under the general issue. (*May* v. *Burdett*, 9 Q. B. 101; and see *Fleming* v. *Orr*, 2 Macq. H. L. Cases, 14.) It is said that the fact of the plaintiff having brought the injury on himself, by wilfully going within reach of the animal after warning of its mischievous nature, must, if a defence, be specially pleaded. (*May* v. *Burdett*, 9 Q. B. 101, 113.)

(*b*) In actions for negligence the plea of not guilty in general denies the negligence, the damage sustained, and that the negligence caused the damage. It admits all material facts stated by way of inducement. (r. 16, T. T. 1853; and see *ante*, "*General Issue*," p. 593; "*Negligence*," p. 317.)

As to negligence, "the rule of law is, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." (Per Parke, B., in *Davies* v. *Mann*, 10 M. & W. 546, 549; *Bridge* v. *Grand Junction Ry. Co.*, 3 M. & W. 245; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Clayards* v. *Dethick*, 12 Q. B. 439; *Tuff* v. *Warman*, 27 L. J. C. P. 322; 5 C. B. N. S. 573; *Thompson* v. *North-Eastern Ry. Co.*, 30 L. J. Q. B. 67.) When therefore the damage caused by negligence is charged in the declaration as the gist of the action, the defendant may show under the general issue that the plaintiff so contributed by his own negligence to cause the damage that it was not attributable to the act of the defendant. (*Marriott* v. *Stanley*, 1 M. & G. 568; *Holden* v. *Liverpool Gas Co.*, 3 C. B. 1; *Dakin* v. *Brown*, 8 C. B. 92; *Thorogood* v. *Bryan*, 8 C. B. 131; *Haigh* v. *London and North-Western Ry. Co.*, 8 W. R. Q. B. 6.)

But where, instead of the declaration being framed on the alleged negligence of the defendant charging the damage as a consequence, it charges the injury as a direct trespass, then the general issue denies the act only, and if the defendant means to contend that it was caused by the plaintiff's negligence, he must plead that defence specially. (*Knapp* v. *Salsbury*, 2 Camp. 500; *Hall* v. *Fearnley*, 3 Q. B. 919; *M'Laughlin* v. *Pryor*, 4 M. & G. 48.)

In actions for negligent driving, where the declaration states by way of inducement that the defendant was possessed of a carriage, or that a carriage was under his management or that of his servant at the time of the injury, the defendant cannot dispute these facts under the plea of not guilty. (r. 16, T. T. 1853; *Taverner* v. *Little*, 5 Bing. N. C. 678; *Hart* v. *Crowley*, 12 A. & E. 378; *Dunford* v. *Trattles*, 12 M. & W. 530.) But in a declaration charging that the defendant by his servant negligently drove and injured the plaintiff, an allegation by way of inducement "that the defendant was possessed of a cart and horse which was being driven by his servant," without stating "at the time of the grievance complained of," was held an immaterial allegation and not traversable, and the defendant was allowed to show under not guilty that the driver was not his servant in the doing of the act complained of. (*Mitchell* v. *Crassweller*, 13 C. B. 237; and see *ante*, "*General Issue*," p. 593; "*Master and Servant*," p. 313.)

Where the count charges the negligence as the act of the defendant, the plaintiff may show under the plea of not guilty that the injury was caused by the negligent driving of the defendant, either by himself or by his servant (*Mitchell* v. *Crassweller*, 13 C. B. 237; *Quarman* v. *Burnett*, 6 M. & W. 499), or by a person authorized by him to drive. (*Wheatley* v. *Patrick*, 2 M. & W. 650.) Under the same issue the defendant may show that the injury was caused by the negligence or bad driving of the plaintiff or his servant (*Gough* v. *Bryan*, 2 M. & W. 770; *Ellis* v. *South-Western Ry. Co.*, 26 L. J. Ex. 349; 2 H. & N. 424), or by the negligence of the driver of a public carriage in which the plaintiff was riding. (*Thorogood* v. *Bryan*, 8 C. B. 131; *Bridge* v. *Grand Junction Ry. Co.*, 3 M. & W. 244.)

In an action at the suit of an infant of tender years for an injury occasioned by the negligence of the defendant, the defendant cannot show in answer to his own negligence, that the injury was caused by the want of care in the infant (*Lynch* v. *Nurdin*, 1 Q. B. 29); but it is a defence to such an action that the infant was under the care of a person whose negligence caused the injury. (*Waite* v. *North-Eastern Ry. Co.*, 27 L. J. Q. B. 417; 28 L. J. Q. B. 258; E. B. & E. 728, where this defence was specially pleaded.)

The above observations, for the most part, apply also to actions for collisions and injuries occasioned by negligent navigation. Where the declaration is framed upon the negligence as the gist of the action, the defendant may show under the general issue that the collision was caused by the negligent navigation of the plaintiff. (*Vennall* v. *Garner*, 1 C. & M. 21.) The defendant may show under the same issue that the collision was caused by the non-observance on the part of the plaintiff of the Admiralty regulations, disentitling the plaintiff to recover any damages under the 14 & 15 Vict. c. 79, s. 28. (*Dowell* v. *Steam Nav. Co.*, 26 L. J. Q. B. 59; 5 E. & B. 195.)

By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 388 (amended by the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. c. 63), no owner or master of any ship shall be answerable for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, where the employment of such pilot is compulsory. See a plea to this effect, *Lucey* v. *Ingram*, 6 M. & W. 302.

Partners are jointly liable for the negligence of one of them in the conduct of the partnership business. (*Moreton* v. *Hardern*, 4 B. & C. 223; *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183.)

Plea, in an Action for Negligent Driving, traversing that the Carriage was the Plaintiff's [or Defendant's] (a).

That the said carriage was not the plaintiff's [*or* defendant's] as alleged.

Plea, in a like Action, traversing that the Carriage was under the care of the Defendant's Servant.

That the said carriage and horses were not under the management, care, or control of the defendant's servant as alleged.

Plea, to a Count for a Trespass, that it was caused by the Plaintiff's own Negligence. (*See ante, p.* 447.)

That the alleged trespass was caused by the negligence and improper conduct of the plaintiff and not otherwise.

Plea to a count for a trespass by a collision, that it was caused by the plaintiff's negligent driving: M'Laughlin v. *Pryor*, 4 M. & G. 48.

New Assignment (*b*).

New Assignment of other Wrongs.

[*Commence with one of the forms, ante, p.* 393,] trespasses [or

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(*a*) This and the following plea are necessary only where the facts denied by them are alleged in the declaration by way of material inducement, so as to be admitted by the plea of not guilty. (See note *ante*, p. 635.)

(*b*) See observations on new assignment in general, *ante*, p. 553, which are applicable for the most part to actions for wrongs as well as to actions on contracts.

In actions for wrongs, besides a new assignment of other causes of action, it frequently happens that the plaintiff has to complain of excess in the trespasses or grievances justified by the plea. Thus in an action for an assault to which the defendant has pleaded *son assault demesne* or any other justification of the assault, but the plaintiff means to contend that the defendant used greater violence than was necessary for self-defence, or than the occasion required, the plaintiff may plead by way of new assignment that he sues for trespasses committed to a greater extent and with more violence than was necessary for the purpose stated in the plea. (*Penn* v. *Ward*, 2 C. M. & R. 338.) Since the C. L. P. Act, 1852, it has been held that under the form of plea of self-defence there given (see Sched. B. 45), the plaintiff may take issue and give evidence of the excess without any new assignment (*Dean* v. *Taylor*, 11 Ex. 68), which he could not do under a traverse of the more particular form of plea in use before that act. (*Penn* v. *Ward*, *supra*.)

So where the defendant has pleaded a warrant or other cause justifying an imprisonment, but he detained the plaintiff for a longer time than such justification authorized (*Lambert* v. *Hodgson*, 1 Bing. 317; *Worth* v. *Terrington*, 13 M. & W. 780), or where he has justified entering a house under a *fi. fa.*, or for any other legal cause, but he remained in the house

grievances] committed by the defendant at other times [*or* upon other occasions *or* for other purposes] than those referred to in the said plea [*or* pleas].

New assignment, to a plea justifying an assault in order to remove the plaintiff from the defendant's house, of an assault in other places and for other purposes and after the removal: Hayling v. *Okey*, 8 Ex. 531.

New assignment, to a plea justifying under a fi. fa., that the defendant entered the plaintiff's house and seized his goods after payment of the amount of the writ; Gregory v. *Cotterell*, 25 L. J. Q. B. 33; 5 E. & B. 571.

New assignment, to a plea justifying under a distress for rent, of a detainer of the goods after payment of the arrears and expenses: West v. *Nibbs*, 4 C. B. 172.

New Assignment of an Excess.

[*Commence with one of the forms, ante, p.* 393.] Trespasses [*or* grievances] committed by the defendant to a greater extent and with more violence [*or* for a longer time] than was necessary for the purposes [*or* upon the occasions] referred to in the said plea [*or* pleas].

New assignment, for an excess of time beyond the justification, in an action of trespass to land: Loweth v. *Smith*, 12 M. & W. 582; *Smart* v. *Morton*, 5 E. & B. 30.

New assignment, to a plea justifying an entry into the plaintiff's house under a fi. fa., for staying an unreasonable time after the execution of the writ; Playfair v. *Musgrove*, 14 M. & W. 239; *Ash* v. *Dawnay*, 8 Ex. 237.

New assignment, to plea of justification under civil process, of an imprisonment after a warrant of discharge: Howard v. *Hudson*, 2 E. & B. 1.

New assignment, to a plea justifying the removal of the plaintiff from a church for improper conduct and detaining him because he threatened to return, of a detention beyond a reasonable time: Worth v. *Terrington*, 13 M. & W. 781.

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for a longer time than was necessary to execute the writ or to satisfy the cause assigned (*Loweth* v. *Smith*, 12 M. & W. 582; *Playfair* v. *Musgrove*, 14 M. & W. 239; *Ash* v. *Dawnay*, 8 Ex. 237), the plaintiff must new assign for the excess complained of. And in such cases the plaintiff may, together with the new assignment, reply to the justification in the plea; and he may do both without obtaining leave to plead several matters. (See the same cases.)

Where the excessive trespass amounts to an abuse of an authority or licence given by law under which the defendant assumes to act, he becomes a trespasser *ab initio* and not only for the excess. (*Six Carpenters' case*, 8 Co., 146, b; 1 Smith, L. C., 5th ed. 128; *Shorland* v. *Govett*, 5 B. & C. 485; *Oakes* v. *Wood*, 2 M. & W. 791, 797; *Price* v. *Woodhouse*, 1 Ex. 559.) In such case the plaintiff may maintain his action for the whole trespass and not alone for the excess, and to the plea of justification under the authority the plaintiff should reply the excess strictly as a replication of new matter, which avoids the effect of the plea altogether, and not new assign it as another and different trespass. (Ib.)

New Assignment to Pleas of Right of Way and Right of Common.
(*C. L. P. Act*, 1852, *Sched. B.* 55 (*a*).)

[*Commence with one of the forms, ante, p.* 393.] Trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land and on other occasions and for other purposes than those referred to in the said pleas.

New assignment, to a plea of right of way, of a trespass extra viam and of excess: South Metropolitan Cemetery Co. v. *Eden*, 16 C. B. 42.

New assignment, to a plea of right of common, of excessive trespass in removing obstructions: Arlett v. *Ellis*, 7 B. & C. 346.

New Assignment in an Action for the wrongful Conversion of Goods (*b*).

[*Commence with one of the forms, ante, p.* 393.] That the defendant converted to his own use or wrongfully deprived the plaintiff of the use and possession of other goods of the plaintiff than those referred to in the said plea. [*If the new assignment is for another conversion of the same goods, the first form above given must be used.*]

(*a*) If the plaintiff relies on trespasses committed on other spots than in the way pleaded, he may new assign, and so also if he relies upon acts done not in exercise of the right of way. (*Senhouse* v. *Christian*, 1 T. R. 56; *Robertson* v. *Gantlett*, 16 M. & W. 289.) Where the defendant pleaded a right of way, and that he pulled down rails because they obstructed the right of way, and the replication denied that the rails obstructed the right of way, the plaintiff was not allowed to prove that the defendant pulled down rails which were standing beyond the limits of the way. For such trespass he should have new assigned. (*Bracegirdle* v. *Peacock*, 8 Q. B. 174.) Where the replication to a like plea denied the right of way only, the defendant was allowed to prove a right of way in a direction in which the rails were not, and was not bound to prove a right of way through the rails. (*Webber* v. *Sparks*, 10 M. & W. 485.) Where the defendant pleaded a justification of trespasses in exercise of a prescriptive right to enter and dig sand, it was held that a replication taking issue on the plea denied the right only, and not that the trespasses were committed in exercise of the right, and if the plaintiff wished to proceed for trespasses not within the right he ought to have new assigned. (*Glover* v. *Dixon*, 9 Ex. 158.)

(*b*) In an action for the conversion of goods, a new assignment may be pleaded, not only in respect of the conversion of other goods, but also in respect of the conversion of the same goods upon other occasions than those pleaded to. (*Brancker* v. *Molyneux*, 1 M. & G. 710.) In an action for a wrongful conversion of goods where the defendant pleaded a lien under a special agreement, the plaintiff was held not entitled, without a new assignment, to recover for the conversion of goods not included in the special agreement, though within the description in the declaration. (*Hawthorne* v. *Newcastle and North Shields Ry. Co.*, 3 Q. B. 734.) In such case a new assignment is necessary in order to recover for the conversion of goods which cannot be justified by the lien. (*Bolton* v. *Sherman*, 2 M. & W. 395.) In an action for the conversion of timber, where the defendant pleaded that the timber was obstructing a public river and therefore he removed it, it was held that the plaintiff might properly traverse the justification and also new assign for the conversion of other timber than that to which the justification was pleaded. (*Page* v. *Hatchett*, 8 Q. B. 187.)

Like new assignments: Page v. *Hatchett*, 8 Q. B. 187: *Brancker* v. *Molyneux*, 1 M. & G. 710.

New assignment to a plea justifying a conversion under a right of lien: Bolton v. *Sherman*, 2 M. & W. 395.

Plea of payment into court, or judgment by default to a new assignment, with entry of relinquishment of plea: see ante, p. 556, and post, p. 647.

NOLLE PROSEQUI. See *ante*, p. 556.

Nolle Prosequi as to one of several Defendants.

And as to the plea of the defendant *G. H.*, the plaintiff says that he will not further prosecute his suit against the said defendant *G. H.* Therefore let the said defendant *G. H.* be acquitted of the premises in the declaration mentioned and go thereof without day. (See Chit. Forms, 9th ed. 840.)

NOTICE OF ACTION (*a*).

(*a*) *Notice of action.*]—In the case of actions against magistrates and many other public officers, etc., for things done in the execution of their duty, previous notice of action is required to be given to them by certain statutes. (See 2 Chit. Pr. 11th ed. 1288.) Also in actions against companies, commissioners, trustees, etc., of public works, notice of action is frequently required to be given by the Acts investing them with statutory powers, where the matter complained of is done in consequence of the Act. The omission of such notice, when required, is a defence to the action, but must be specially pleaded (*Davey* v. *Warne*, 14 M. & W. 199; *Edwards* v. *Great Western Ry. Co.*, 11 C. B. 588); unless by the Act the defendant is allowed to give it in evidence under the plea of the general issue by statute. (*Kirby* v. *Simpson*, 10 Ex. 358; *Taylor* v. *Nesfield*, 3 E. & B. 724.)

The statute 5 & 6 Vict. c. 97, s. 3, repeals so much of any public local and personal acts, or local and personal acts, or acts of a local and personal nature, whereby any party is entitled to plead the general issue and give any special matter in evidence without specially pleading the same. Hence wherever a notice of action is required by any such statute of earlier date, the want of it must now be specially pleaded. The same statute, s. 3, enacts that in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced. This statute does not apply to local and personal statutes passed subsequently to its date. (*Boden* v. *Smith*, 18 L. J. C. P. 121.) As to what statutes are within the enactment, see Ib.; *Cock* v. *Gent*, 12 M. & W. 234; *Richards* v. *Easto*, 15 M. & W. 244; *Moore* v. *Shepherd*, 10 Ex. 424.

By the statutes 24 & 25 Vict. c. 96 (consolidating the statute law relating to larceny), s. 113, the 24 & 25 Vict. c. 97 (consolidating the statute law relating to malicious injuries to property), s. 71, the 24 & 25 Vict. c. 99 (consolidating the statute law against offences relating to the coin), s. 33, it is enacted that notice in writing of any action against any person for anything done in pursuance of any of those acts, and of the cause thereof, shall be given to the defendant one month at least before the commence-

Plea that no Notice of Action was given as required by Statute (*a*).

That the alleged trespasses [*or* grievances] were committed by the defendant after the passing of the statute passed in the —— year of the reign of ——, for [*here recite the title of the Act*], and were

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ment of the action, and the omission may be relied on under the plea of the general issue.

Notice of action is required, and the omission may be relied on under the general issue by statute, for anything done under the Public Health Act, 11 & 12 Vict. c. 63, s. 139, *ante*, p. 336 (see *Newton* v. *Ellis*, 5 E. & B. 115); under the Act relating to Highways in General, 5 & 6 Will. IV. c. 50, s. 109, *ante*, p. 293; under the County Courts Act, 9 & 10 Vict. c. 95, s. 138, *ante*, p. 261 (see *Booth* v. *Clive*, 10 C. B. 827); under the Police Acts, *ante*, p. 334; under the Metropolis Local Management Acts, 25 & 26 Vict. c. 102, s. 106; in actions against justices of the peace, *ante*, p. 300; in actions against revenue officers, 8 & 9 Vict. c. 87, s. 117.

The notice of action required under the above and similar statutes is not limited to cases where the defendant acted strictly within the authority of the statute, in which cases the act of the defendant would be justifiable under the statute and no other protection would be required.

A person is entitled to notice of action as acting under or by virtue or in pursuance of the statute or in execution of his office, where he in fact *bonâ fide* believed that he was acting in pursuance of the statute or in execution of his office (*Kine* v. *Evershed*, 10 Q. B. 143; *Hughes* v. *Buckland*, 15 M. & W. 346; *Horn* v. *Thornborough*, 3 Ex. 846); though he may not have had reasonable grounds for such belief; provided it was not obvious that he could not have been acting under the statute. (*Booth* v. *Clive*, 10 C. B. 827; *Read* v. *Coker*, 13 C. B. 850; *Jones* v. *Howell*, 29 L. J. Ex. 19; and see *Jones* v. *Gooday*, 9 M. & W. 736; *Hazeldine* v. *Grove*, 3 Q. B. 997; *Hardwick* v. *Moss*, 7 H. & N. 136; 31 L. J. Ex. 205.) It is sufficient if the defendant believed he was acting under some law, though he did not know in fact of the particular enactment. (*Norwood* v. *Pitt*, 29 L. J. Ex. 127; 5 H. & N. 801.)

Constables sued for excessive violence in the performance of their duty were held entitled to notice of action as being sued for a thing done under or by virtue of the Act under which they were appointed. (*Butler* v. *Ford*, 1 C. & M. 662.) A magistrate acting in the execution of his office, is, by the 11 & 12 Vict. c. 44, entitled to notice of action, although he acts maliciously and without reasonable and probable cause. (*Kirby* v. *Simpson*, 23 L. J. M. C. 165.) The bailiff of a county court sued for taking the goods of the wrong person by mistake under a warrant was held entitled to notice of action as sued for an act done in pursuance of the Act. (*Burling* v. *Harley*, 27 L. J. Ex. 258; and see *Cronshaw* v. *Chapman*, 31 L. J. Ex. 277.) A surveyor under the Highway Act, sued for negligence in leaving heaps of gravel on the highway, was held entitled to notice of action as being charged with a thing done in pursuance of the Act. (*Davis* v. *Curling*, 8 Q. B. 286.) Improvement Commissioners, under a local Act, sued for the negligence of their servants, were held entitled to notice. (*Mason* v. *Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J. Ex. 407.) A railway company sued for default of duty as common carriers were held not to be entitled to notice of action, as not being sued for anything done or omitted to be done in pursuance of their Act, or in the execution of the powers and authorities given by it (*Carpue* v. *London and Brighton Ry. Co.*, 5 Q. B. 747; *Palmer* v. *Grand Junction Ry. Co.*, 4 M. & W. 749); but in an action to recover back excessive charges for the carriage of goods, a railway company were held to be entitled to such notice. (*Kent* v. *Great Western Ry. Co.*, 3 C. B. 714.)

(*a*) In an action against a railway company for money received and

committed by the defendant under and by virtue of [*or* in pursuance of, *according to the words of the statute*] the said statute; and no notice [in writing, signed, *etc., as the case may be*] of commencing this action was given to the defendant [one calendar month] before the same was commenced pursuant to the said statute [*or* the statutes in that behalf].

Like pleas: Peck v. *Boyes*, 6 M. & G. 726; *Eliot* v. *Allen*, 1 C. B. 18; *Booth* v. *Clive*, 10 C. B. 827.

A like plea, by a railway company, to common counts for money received and upon accounts stated: Garton v. *Great Western Ry. Co.*, 27 L. J. Q. B. 375; 28 L. J. Q. B. 321. [*Held bad for not showing how the causes of action arose out of acts done under the statute.*]

A like plea by the bailiff of a county court: Tarrant v. *Baker*, 14 C. B. 200.

A like plea, by commissioners, under a local Act: Mason v. *Birkenhead Improvement Commissioners*, 6 H. & N. 72.

Nuisance.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

Plea justifying a Trespass to abate a Nuisance.

That before and at the times of the alleged trespasses he was possessed of a messuage and premises adjoining the said messuage and

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upon accounts stated, to which the defendants pleaded that no notice of action was given in pursuance of their Act, without alleging that the money was received or accounts were stated in pursuance of their Act, the plea was held bad, as not showing that the action was within the terms of the Act requiring notice. (*Garton* v. *Great Western Ry. Co.*, 28 L. J. Q. B. 321; 1 E. B. & S. 837.)

(*a*) In actions for injuries caused by nuisances, the plea of not guilty denies that the defendant caused the nuisance, and that the plaintiff has suffered damage from it: it admits all material matters of inducement, such as the alleged right of the plaintiff, which, if denied, must be traversed in terms. (*Norton* v. *Scholefield*, 9 M. & W. 665; *Frankum* v. *Lord Falmouth*, 2 A. & E. 452; *Grenfell* v. *Edgcome*, 7 Q. B. 661; and see *ante*, p. 324, 595.) By r. 16, T. T. 1853, "in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house."

"In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way."

In an action for constructing a cesspool so near the plaintiff's well that the water was contaminated, not guilty denies not only the construction of the cesspool, but also that the water was contaminated. (*Norton* v. *Scholefield*, 9 M. & W. 665.)

In an action for keeping some iron gratings on a highway without any light, in consequence of which the plaintiff fell over them, not guilty traverses

premises of the plaintiff, and the said [pipe and flue] were used by the plaintiff for the [emission of smoke and sparks therefrom] and were wrongfully a nuisance to the defendant in the use and occupation of his said messuage and premises, and were dangerous to his said messuage and premises and prevented him from conveniently and safely enjoying the same; and although before the alleged trespasses or any of them, the defendant requested the plaintiff to remove the said [pipe and flue] and abate the said nuisance, and a reasonable time in that behalf had then elapsed, yet the plaintiff neglected and refused so to do; wherefore the defendant afterwards for the purpose of abating the said nuisance took the said [pipe and flue] and removed them to a short and convenient distance and there left them for the plaintiff's use, doing no more than was necessary for the purpose aforesaid, which are the alleged trespasses.

Plea justifying the Removal of [Coping Stones] because they overhung Defendant's Land.

That at the times of the alleged trespasses he was possessed of land adjoining the said land of the plaintiff, and the plaintiff had built the said [wall] at the extremity of his said land next to the said land of the defendant, and had wrongfully so placed the said [coping stones] on the said [wall] that the same then wrongfully extended beyond the said [wall] and overhung and incumbered the said land of the defendant, wherefore the defendant removed the said [coping stones] from and off his said land to a small and convenient distance into and upon the said land of the plaintiff, which was then a convenient place for putting the same, and there left them for the plaintiff's use, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Pleas justifying the removal of nuisances on a public highway: see post, "Ways," p. 688.

Other pleas justifying the removal of nuisances: see ante, "Lights," p. 630; *post, "Trespass to Land," p.* 679.

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that the defendant kept the gratings on the highway without warning the public as alleged, and an allegation in the declaration, that they were under the care and custody of the defendant, was held to be immaterial. (*Grew* v. *Hill*, 3 Ex. 801.)

A right in the defendant to make the alleged nuisance must be specially pleaded, as the enjoyment for twenty years of an easement, within 2 & 3 Will. IV. c. 71, s. 2. (*Flight* v. *Thomas*, 10 A. & E. 590, where see such a plea.)

Where the nuisance is in respect of the use of fixed property, the defendant may plead that he was not possessed of the property which caused the nuisance (*Rich* v. *Basterfield*, 4 C. B. 783; and see *Bishop* v. *Bedford Charity*, 28 L. J. Q. B. 215; 1 E. & E. 697).

In the case of *Hole* v. *Barlow*, 27 L. J. C. P. 207; 4 C. B. N. S. 437, an action for carrying on a noxious trade (see *ante*, p. 328), it was held to be a defence, admissible under the general issue, that the trade was necessary and carried on in a proper and reasonable place and in a proper and reasonable manner; but this case has been since overruled, and these facts afford no justification of a nuisance. (*Bamford* v. *Turnley*, 10 W. R. Ex. Ch. 803; and see *Stockport Waterworks Co.* v. *Potter*, 31 L. J. Ex. 9.)

Plea on equitable grounds that the nuisance was erected by the defendant with the knowledge, acquiescence, and consent of the plaintiff: *Davies* v. *Marshall*, 10 C. B. N. S. 697; 31 L. J. C. P. 61.

PATENTS.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

Plea traversing that the Plaintiff was the Inventor.

That the plaintiff was not the first and true inventor of the said manufacture as alleged.

Plea traversing that the Invention was New.

That the said invention was not new as alleged.

A like plea: *Bush* v. *Fox*, 9 Ex. 651.

Plea that part of the invention was not new: *Bentley* v. *Keighley*, 1 D. & L. 944; 6 M. & G. 1039.

Plea that the Manufacture was not one for which Letters-patent could be granted (*b*).

That the said manufacture was not any manner of manufacture for which letters-patent could by law be granted.

A like plea together with the preceding one: *Booth* v. *Kennard*, 26 L. J. Ex. 305; 2 H. & N. 84; *Seed* v. *Higgins*, 8 E. & B. 755.

(*a*) The plea of not guilty denies that the defendant infringed the patent-right of the plaintiff; it puts in issue the mere act of infringement, and not the intention of the defendant to infringe, which is immaterial. (*Stead* v. *Anderson*, 4 C. B. 806.) All allegations necessary to establish the validity of the patent-right of the plaintiff must, if denied, be met by specific traverses: as, that the plaintiff was not the true and first inventor; that he had no grant of letters-patent; that the specification was insufficient; that the invention was not new; that the invention was not one for which letters-patent could be granted; as in the forms given above.

Where part of the invention is shown by the declaration to have been disclaimed, the pleas should be confined to the undisclaimed part. (*Clark* v. *Kenrick*, 12 M. & W. 219.)

Pleas disputing the validity of the patent cannot be pleaded in an action for penalties for using the name of a patent without authority from the patentee, under the 5 & 6 Will. IV. c. 87, s. 7. (*Myers* v. *Baker*, 28 L. J. Ex. 90; 3 H. & N. 802.)

(*b*) It would be improper to plead that the invention was not a new manufacture, as it would be ambiguous whether the plea intended to dispute the novelty of the invention as in the last plea, or the nature of the manufacture as in the present. (*Walton* v. *Bateman*, 3 M. & G. 773; *Spilsbury* v. *Clough*, 2 Q. B. 466.)

That the Invention was not useful to the Public.

That the said manufacture was not nor is any improvement whatsoever or in any way useful or beneficial to the public.

Like pleas: Morgan v. *Seaward*, 2 M. & W. 544; *Betts* v. *Walker*, 14 Q. B. 363.

Denial of the Grant of the Letters-patent (non concessit).

That her said Majesty did not by letters-patent grant to the plaintiff the sole privilege to make, use, exercise, and vend the said invention as alleged.

Plea that no sufficient Specification was enrolled.

That the plaintiff did not within six calendar months next after the date of the said letters-patent cause to be enrolled [*or* filed] in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be or might be performed.

A like plea: Seed v. *Higgins*, 8 E. & B. 755.

Plea that the specification was inconsistent with the style and title of the invention for which the letters-patent were granted: Stead v. *Carey*, 1 C. B. 496.

Plea that the letters-patent were obtained by a false representation: Russell v. *Ledsam*, 11 M. & W. 647; *Bedells* v. *Massey*, 7 M. & G. 630 (*a*).

Pleas to an action for infringing a patent, disclaimed as to part: —that the disclaimer extended the right claimed; —that the invention as altered by the disclaimer was not comprised in the original patent: Seed v. *Higgins*, 8 E. & B. 757.

Plea to an action by the assignee of a patent traversing the assignment: Chollet v. *Hoffman*, 26 L. J. Q. B. 249; 7 E. & B. 686. [*This traverse puts in issue the registration of the assignment which is necessary under the Patent Law Amendment Act*, 1852, *to complete the title of the assignee: Chollet* v. *Hoffman*, 7 E. & B. 686.]

Particulars of Objections to be delivered with the Pleas in an Action for the Infringement of a Patent (15 *&* 16 *Vict. c.* 83, *s.* 41) (*b*).

In the ——.

A. B. plaintiff against *C. D.* defendant.

The following are the particulars of the objections on which the

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(*a*) The recitals in letters-patent are taken to be representations made to the Crown by the patentee for the truth of which he is reponsible; and if they are untrue, the patent is void not only as against the Crown, but as regards an action against a third person. Hence it is a good plea to an action for infringing a patent that a matter recited in the letters-patent is untrue. (*Morgan* v. *Seaward*, 2 M. & W. 544, 561.)

(*b*) By the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 41

above-named defendant means to rely at the trial in support of the pleas in this action:—

1. That the defendant is not guilty of the alleged grievances.
2. That the plaintiff was not the first and true inventor.
3. That the alleged invention was not new.
4. That the alleged invention was not a manufacture for which letters-patent could be granted.
5. That the alleged invention was not useful to the public.
6. That her Majesty did not grant the alleged letters-patent.
7. That prior to the date of the letters-patent the alleged invention was published at —— [*state the place*] in the following manner [*state the manner of publication*].
8. That prior to the date of the letters-patent the alleged invention was used at —— [*state the place*] in the following manner [*state the manner of use*].
9. That no specification was enrolled [*or* filed].
10. That the specification enrolled was not sufficient.

[*State any other objections in the same manner.*]

To Mr. *C. D.*, plaintiff's attorney or agent.

Yours, etc.,
G. H. defendant's attorney [*or* agent].

See like forms: Chit. Forms, 9th ed. 825; *Russell* v. *Ledsam*, 11 M. & W. 647; *Palmer* v. *Cooper*, 9 Ex. 231; *Palmer* v. *Wagstaffe*, 8 Ex. 840; *Hull* v. *Bollard*, 1 H. & N. 134; 25 L. J. Ex. 304.

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Payment into Court (*a*).

(cited *ante*, p. 331), in any action for the infringement of letters-patent, the defendant, on pleading thereto, shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas in the said action, and at the trial of such action no evidence shall be allowed to be given in support of any objection impeaching the validity of such letters-patent which shall not be contained in the particulars delivered as aforesaid; provided always that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters-patent shall be stated in such particulars; provided also, that it shall and may be lawful for any judge at chambers to allow such defendant to amend the particulars delivered as aforesaid upon such terms as to such judge shall seem fit. (See 2 Chit. Pr. 11th ed. 1452.)

(*a*) The C. L. P. Act, 1852, s. 70 (see *ante*, p. 562), enacts that "it shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, or debauching of the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends." The section proceeds to make an express reservation of the provision of the 6 & 7 Vict. c. 96, s. 2, respecting payment into court in actions of libel. The sections 71, 72, 73, and r. 12 H. T. 1853 (cited *ante*, p. 562), prescribe the mode in which payment into court shall be pleaded and replied to, and the proceedings thereupon.

The action of detinue is not excepted in the above provision, but after the C. L. P. Act, 1854, s. 78, giving execution for the return of the chattel detained (cited *ante*, p. 272), it was held that payment into court could not be pleaded in such action where the plaintiff claims a return of the goods

(*Allan* v. *Dunn*, 26 L. J. Ex. 185; 1 H. & N. 572); though it might be pleaded in respect of the damages claimed for the detention of the goods as distinct from the claim for the specific return. (*Crossfield* v. *Such*, 8 Ex. 159.) Now by the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 25, it is enacted that "in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of the C. L. P. Act, 1852; and the like proceedings may be had and taken thereupon as to costs and otherwise."

By the C. L. P. Act, 1860. s. 23, it is enacted "that the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction in like manner and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions;" and by s. 24, "such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond."

A plea of payment into court is also given in some other actions for wrongs by particular statutes; as by 6 & 7 Vict. c. 96, s. 2, in actions for a libel in a newspaper or other periodical publication: see this plea and the statute, *ante*, p. 615. By 11 & 12 Vict. c. 63 s. 139 (the Public Health Act), *ante*, p. 336, in actions for anything done under that Act by or under the directions of a local board of health, payment into court may be made and pleaded. So also by 8 & 9 Vict. c. 87, s. 120, in actions against revenue officers; and by 25 & 26 Vict. c. 102, s. 106, in actions for anything done under the Metropolis Local Management Acts.

Payment into court of amends may be made and given in evidence under the general issue, in actions against justices of the peace, by 1 & 12 Vict. c. 44, s. 11; see *ante*, p. 300; in actions against police constables, see *ante*, p. 334; in actions for anything done under the County Courts Acts, see *ante*, p. 261; under the Highway Act, *ante*, p. 293; under the 24 & 25 Vict. c. 96, for consolidating the statute law relating to larceny, see s. 113; under the 24 & 25 Vict. c. 97, for consolidating the statute law relating to malicious injuries to property, see s. 71; under the 24 & 25 Vict. c. 99, for consolidating the statute law against offences relating to the coin, see s. 33.

The observations made upon this plea in actions on contracts (see *ante*, p. 561) will apply for the most part to actions for wrongs. As regards its effect as an admission the plea may, according to the form of the declaration, be subject either to the rule applicable to special counts in contract, or to that applicable to indebitatus counts. Where in an action of tort the declaration is general and unspecific, the payment of money into court, though it admits a cause of action, does not admit the cause of action sued for; and the plaintiff must give evidence of the particular cause of action before he can have larger damages than the amount paid into court. On the other hand, if the declaration is specific, so that nothing would be due to the plaintiff from the defendant unless the defendant admitted the particular claim made by the declaration, the payment of money into court admits the cause of action sued for and stated in the declaration. (*Perren* v. *Monmouthshire Ry. Co.* 11 C. B. 855.)

In an action of trespass for taking and damaging the plaintiff's cups to which the defendant paid £10 into court, it was held that the plaintiff failed to sustain the issue of damages ultra by producing a cup damaged to a greater extent than £10, but which he did not prove to be one taken by the defendant. (*Schreger* v. *Carden*, 11 C. B. 851.) So in an action for pound breach and rescue, under the issue of damages ultra the plaintiff must prove that goods of greater value than the sum paid into court were rescued. (*Story* v. *Finnis*, 6 Ex. 123.) So in an action for selling goods

Plea of Payment into Court. (C. L. P. Act, 1852, s. 71 (a).)

The defendant by *G. H.* his attorney [*or* in person, *and if the plea is not pleaded to the whole of the declaration, say,* as to the first *or* second, *or as the case may be* count of the declaration *or* as to so much of the —— count of the declaration as alleges that *or* as relates to, *stating the part pleaded to*], brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Plea of Payment into Court to a New Assignment with Entry of a Relinquishment of Pleas (see ante, p. 556).

The defendant, as to the plaintiff's new assignment to the —— plea, says that he relinquishes his said —— and —— pleas so far as the same relate to the trespasses [*or* grievances] above newly assigned; and the defendant as to the trespasses [*or* grievances] above newly assigned brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Replication accepting the Sum paid into Court in Satisfaction. (C. L. P. Act, 1852, s. 73.)

That he accepts the sum paid into court in full satisfaction and discharge of the cause [*or* causes] of action in respect of which it has been paid in.

Replication that the Sum paid in is not enough. (C. L. P. Act, 1852, s. 73.)

That the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded.

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taken under a distress without having them duly appraised, under the same issue the plaintiff must show a sale without appraisement of goods beyond the value of the goods admitted to be so sold by the plea. (*Knight* v. *Egerton*, 7 Ex. 407.) In an action against a railway company for an injury to the plaintiff caused by their negligence, upon the issue of damages ultra the plaintiff was held entitled to recover the extra damage without any proof of the negligence of the defendants. (*Perren* v. *Monmouthshire Ry. Co.*, 11 C. B. 855.)

(*a*) The form of plea given by the statute is sufficient in all cases, and must not state the character or special circumstances (if any) by reason of which the defendant is entitled to plead the payment of money into court. (*Aston* v. *Perkes*, 15 M. & W. 386; *Key* v. *Thimbleby*, 6 Ex. 692; *Thompson* v. *Sheppard*, 4 E. & B. 53.) The objection to the payment on these grounds cannot be replied (*Thompson* v. *Sheppard*, 4 E. & B. 53), and cannot be raised on the record. The plaintiff must apply to a judge or the court to set aside the plea and the payment as an irregularity, if the money is paid in under circumstances not justified by any statute. (Ib.)

POLICE. See *ante*, p. 334.

POUND BREACH. See *ante*, p. 282.

PRESCRIPTIVE RIGHTS.

See "*Common*," *ante*, p. 602; "*Lights*," *ante*, p. 629; "*Support*," *post*, p. 664; "*Watercourses*," *post*, p. 681; "*Ways*," *post*, p. 683.

PROCESS (*a*).

Plea, in an Action of Trespass, of Justification under a Fi. Fa., by the Execution Creditor, the Sheriff and the Bailiff, setting out the Writ and Warrant.

That before any of the alleged trespasses the defendant *E. F.* on the —— day of ——, A. D. ——, in the Court of ——, at Westminster, by the judgment of the said court recovered against the plaintiff £——, and thereupon, the said judgment remaining in full force and unsatisfied, the defendant *E. F.* sued out of the said court a writ of fieri facias upon the said judgment, against the plaintiff, directed to the sheriff of the county of ——, whereby her Majesty the Queen commanded the said sheriff that [he should omit not by reason of any liberty of his said county, but that he should enter

(*a*) The party at whose suit the process issues in order to justify under it must set out in his pleading the judgment or other proceedings on which the writ issues as well as the writ; it is sufficient for the sheriff or his officer pleading alone to justify under the writ only. (*Andrews* v. *Marris*, 1 Q. B. 3, 17.) But where the sheriff or officer joins in pleading with the party suing out the process, all the proceedings must be stated; and the sheriff becomes bound by the sufficiency of the whole pleading equally with the party himself. (Ib.; *Samuel* v. *Duke*, 3 M. & W. 630; *Hedges* v. *Chapman*, 2 Bing. 523, 526; 1 Wms. Saunders, 28 *a*.) It is important therefore where there is any question as to the validity of the judgment or proceeding on which the writ was founded, for the sheriff or his officer to plead separately from the party to the judgment and to justify under the writ only.

In order to justify an act under civil process the person executing the process must have the warrant in his possession at the time of the execution, but it is sufficient in pleading to aver that the warrant was delivered to him to be executed. (See *Galliard* v. *Laxton*, 31 L. J. M. C. 123, 127.) It is not necessary in pleading a justification under a *fi. fa.* or a *ca. sa.* to show the return of the writ. (*Cheasley* v. *Barnes*, 10 East, 73; *Shorland* v. *Govett*, 5 B. & C. 485, 488.)

In actions for the wrongful conversion of goods the defence of a justification under a writ of *fi. fa.* may be given in evidence under the plea of not guilty, and should not be pleaded specially. (See *Unwin* v. *St. Quintin*, 11 M. & W. 277, 286.)

As to what the sheriff and his officers may do in the execution of a writ, see *Semayne's Case*, 1 Smith's L. C. 5th ed. 85; 1 Chit. Pr. 11th ed. 613.

the same and] of the goods and chattels of the plaintiff in his bailiwick he should cause to be made £—— [*the amount of the judgment*], which the defendant *E. F.* lately in the said court of —— recovered against the plaintiff, whereof the plaintiff was convicted, together with interest upon the said sum at the rate of £4 per centum per annum from the —— day of ——, A. D. ——, on which day the judgment aforesaid was entered up, and that he should have that money with such interest as aforesaid before her said Majesty [*or* her justices *or* her barons of the Exchequer] at Westminster immediately after the execution thereof to be rendered to the defendant *E. F.*, and that he should do all such things as by the statute passed in the second year of her said Majesty's reign he was authorized and required to do in that behalf, and in what manner he should have executed the said writ he should make to appear to her said Majesty [*or* her said justices *or* her said barons of the Exchequer] at Westminster, immediately after the execution thereof, and that he should have there then the said writ; and the said writ was duly indorsed with a direction to the said sheriff to levy £—— and interest thereon at £4 per cent. per annum from the —— day of ——, A. D. ——, besides sheriff's poundage, officer's fees, and other expenses of the execution; and the said writ so indorsed as aforesaid was then delivered to the defendant *G. H.* as and being the sheriff of the said county of ——, to be executed; and thereupon the defendant *G. H.*, as and being such sheriff as aforesaid, duly made his warrant directed to the defendant *J. K.*, as and then being the bailiff of the said sheriff, and thereby commanded him that [he should omit not by reason of any liberty of the said county, but that] he should [enter the same and] cause to be made of the goods and chattels of the plaintiff in the said bailiwick the said £—— together with the said interest at the rate aforesaid, so that the said sheriff might have that money and interest before her said Majesty [*or* the said justices *or* the said barons of the Exchequer] immediately after the execution thereof, to be rendered to the defendant *E. F.*, as required by the said writ, and that he should do all such things as by the said statute the said sheriff was authorized and required to do in that behalf, and that he should have the said warrant and so forth, and in what manner he should have executed the said warrant he should certify to the said sheriff immediately after the execution thereof; and the said warrant was then delivered to the defendant *J. K.*, as and being such bailiff as aforesaid to be executed; and thereupon the said *J. K.* as such bailiff as aforesaid, by virtue of the said writ and warrant and within the said bailiwick of the said sheriff, entered into the said dwelling-house, the outer door thereof being then open, in order to seize and take and did then seize and take the said goods and chattels of the plaintiff, the same then being in the said dwelling-house and in the bailiwick of the said sheriff, for the purpose of levying the moneys so directed to be levied as aforesaid, which are the alleged trespasses.

Plea, in an Action of Trespass, of Justification under a Fi. Fa. by the Sheriff alone.

That before any of the alleged trespasses *J. K.*, on the —— day of ——, A.D. ——, sued out of the Court of ——, at Westminster, a writ of fieri facias directed to the sheriff of the county of——, whereby the Queen commanded the said sheriff that [*here state the substance*

of the writ as in the preceding form], which said writ was duly indorsed with a direction to the said sheriff [*here set out the indorsement on the writ as in the preceding form*], and the said writ so indorsed as aforesaid was then delivered to the defendant, as and being the sheriff of the said county of ——, to be executed; and thereupon the defendant, as and being such sheriff as aforesaid, by virtue of the said writ and in his said bailiwick entered the said dwelling-house, the outer door thereof being then open, in order to seize and take and did then seize and take the said goods and chattels of the plaintiff, the same then being in the said dwelling-house and in the bailiwick of the defendant as such sheriff as aforesaid, for the purpose of levying the moneys so directed to be levied as aforesaid, which are the alleged trespasses.

A like plea by joint defendants as sheriff of Middlesex: Playfair v. *Musgrove*, 14 M. & W. 239; *Jarmain* v. *Hooper*, 6 M. & G. 827.

Like pleas by the bailiff: Gregory v. *Slowman*, 1 E. & B. 360; *Shorland* v. *Govett*, 5 B. & C. 485; *Percival* v. *Stamp*, 9 Ex. 167.

Plea justifying an entry of the plaintiff's house to take the goods of a third party under a fi. fa. against the latter: Carnaby v. *Welby*, 8 A. & E. 872 (*a*).

A like plea justifying the breaking open of doors to perfect the levy: Pugh v. *Griffith*, 7 A. & E. 840.

Plea to an action for an injury to the reversionary interest of the plaintiff in goods in the possession of a third party, that the defendant took and sold them under a fi. fa. against the latter, and that the plaintiff has sustained no damage: Tancred v. *Allgood*, 28 L. J. Ex. 362; 4 H. & N. 438.

Justification of a Trespass and Imprisonment under a ca. sa. by the Judgment Creditor, his Attorney and the Sheriff, setting out the Writ.

That before any of the alleged trespasses the defendant *E. F.*, on the —— day of ——, A.D. ——, in the Court of ——, at Westminster, by the judgment of the said court recovered against the plaintiff £——; and thereupon, the said judgment remaining in full force and unsatisfied, the defendant *E. F.* by the defendant *G. H.*, his attorney, and the defendant *G. H.*, as and being the attorney of the defendant *E. F.*, sued out of the said court a writ of capias ad satisfaciendum upon the said judgment, against the plaintiff, directed to the sheriff of the county of ——, whereby her Majesty the Queen commanded the said sheriff that he should [omit not by reason of any liberty in his said county, but that he should enter the same and] take the plaintiff if he should be

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(*a*) If the plaintiff sues the sheriff for trespass to goods taken under a writ of *fi. fa.* against a third party, the defendant should not justify under the writ, but should traverse the property of the plaintiff in the goods. (*Harrison* v. *Dixon*, 12 M. & W. 142.) If the title of the plaintiff to the goods is by an assignment from the third party, which is void as against creditors, the sheriff who has taken them must prove the judgment as well as the writ in order to justify. (*White* v. *Morris*, 11 C. B. 1015; overruling *Bessey* v. *Windham*, 6 Q. B. 166.)

found in the bailiwick of the said sheriff, and him safely keep so that the said sheriff should have his body before her said Majesty [*or* her justices *or* her barons of the Exchequer] at Westminster immediately after the execution thereof to satisfy the defendant *E. F.* £—— [*the amount of the judgment*] which the defendant *E. F.* lately in her said court recovered against the plaintiff, whereof the plaintiff was convicted, together with interest for the said sum at the rate of £4 per centum per annum from the —— day of ——, A.D. ——, on which day the judgment aforesaid was entered up, and that the said sheriff should have there then the said writ; and the said writ was duly indorsed with a direction to the said sheriff to levy £—— and interest thereon, at £4 per cent. from the —— day of ——, A.D. ——, besides sheriff's poundage, officer's fees, and other expenses of the said execution; and the said writ so indorsed was then delivered to the defendant *J. K.*, as and being the sheriff of the said county of ——, to be executed; and thereupon the defendant *J. K.*, as and being such sheriff as aforesaid, by virtue of the said writ and within his said bailiwick took the plaintiff and kept him in the custody of the defendant *J. K.*, as and being such sheriff as aforesaid, which are the alleged trespasses.

A like plea by the sheriff alone: Barker v. *St. Quintin*, 12 M. & W. 441; *Sandon* v. *Jervis*, 27 L. J. Q. B. 279.

A like plea by the execution creditor alone: Collett v. *Foster*, 26 L. J. Ex. 412.

A like plea by the attorney of the execution creditor alone: Codrington v. *Lloyd*, 8 A. & E. 449.

Plea justifying an entry to execute a ca. sa.: Kerbey v. *Denby*, 1 M. & W. 336.

Plea justifying under a ca. sa. against A. B., stating that the plaintiff represented himself to be A. B. New assignment for detaining plaintiff after he had given notice that he was not A. B.: Dunston v. *Paterson*, 26 L. J. C. P. 267; 2 C. B. N. S. 495 (*a*).

Plea, in an action for imprisonment, justifying under a writ of capias on mesne process: Codrington v. *Lloyd*, 8 A. & E. 449.

Pleas of justification under process of the county court, setting out the proceedings: Walley v. *M'Connell*, 19 L. J. Q. B. 162; *Kinning* v. *Buchanan*, 8 C. B. 271; *Abley* v. *Dale*, 1 L. M. & P. 626; 2 L. M. & P. 433; *Hayes* v. *Keene*, 12 C. B. 233.

Justification by the clerk of the county court under process of that court against the plaintiff for not attending a judgment summons, (under a plea of not guilty by statute): Davies v. *Fletcher*, 2 E. & B. 271.

Plea of justification under a writ of attachment for contempt of the Court of Chancery: Smith v. *Egginton*, 7 A. & E. 167.

(*a*) In the above case both the plea and the new assignment were held good; but where the sheriff takes the defendant by mistake without any misrepresentation on the part of the defendant, as where there are two persons of the same name and the sheriff takes the wrong one, he is liable for the trespass. (*Jarmain* v. *Hooper*, 6 M. & G. 827; and see *Childers* v. *Wooler*, 29 L. J. Q. B. 129.)

A like plea for contempt of the Court of Bankruptcy: Green v. *Elgie*, 5 Q. B. 99; *Van Sandau* v. *Turner*, 6 Q. B. 773.

Plea justifying an entering upon and taking possession of demised premises, expelling the tenant and removing his goods, under a warrant of justices granted for the delivery of possession to the landlord after the determination of the tenancy under the Small Tenements Act, 1 & 2 *Vict. c.* 74, *s.* 1: *Melling* v. *Leak*, 16 C. B. 652; *Edmunds* v. *Pinniger*, 7 Q. B. 558; *Jones* v. *Chapman*, 14 M. & W. 124.

Plea under the same Act, s. 6, *that the alleged trespass was under a warrant obtained by the defendant, who had lawful right to the possession: Delaney* v. *Fox*, 1 C. B. N. S. 166.

Justification under a warrant given under 3 & 4 *Vict. c.* 84, *for putting the defendant into possession of deserted premises (under the general issue by statute): Edwards* v. *Hodges*, 15 C. B. 477.

Plea justifying the removal of obstructions in the street under the authority of the Metropolis Local Management Act to remove Nuisances, 18 & 19 *Vict. c.* 120: *Le Neve* v. *Vestry of Mile End*, 27 L. J. Q. B. 208.

Plea justifying pulling down the plaintiff's house under the Metropolis Local Management Act, 18 & 19 *Vict. c.* 120, *s.* 143, *because built beyond the regular line of buildings of the street: Tear* v. *Freebody*, 4 C. B. N. S. 228.

Plea justifying under a distress warrant issued by justices for rates under a local act: Pedley v. *Davis*, 30 L. J. C. P. 374; 10 C. B. N. S. 492.

Plea that the trespass was committed under civil process, which was subsequently set aside upon the terms that the plaintiff should bring no action: Perkins v. *Plympton*, 7 Bing. 676.

Replications traversing the Judgment or Process (a).

See Nul tiel Record, ante, p. 528; "*Sheriff*," *post, p.* 661; *Jarmain* v. *Hooper*, 6 M. & G. 827.

(*a*) Before the C. L. P. Act, 1852, the replication might traverse the process under which the defendant justifies, or admitting the process might put the rest of the plea in issue by the replication *de injuriâ absque residuo causæ*; as to the effect of which see *Lucas* v. *Nockells*, 10 Bing. 157, as explained by *Oakes* v. *Wood*, 2 M. & W. 791, 798.

It would seem that now the replication taking issue under the C. L. P. Act, 1852, s. 77, puts in issue the process only, and not that the trespasses were committed in execution of the process. If the plaintiff contends that the trespasses were committed for other purposes than in execution of the process he should new assign. (See *Glover* v. *Dixon*, 9 Ex. 158; and "*New Assignment*," *ante*, p. 450.)

When the process is founded on matter of record, as a judgment, the proper mode of denying its existence would be by a replication of *nul tiel record*. (*Swinburn* v. *Taylor*, 9 M. & W. 43.)

Replication that the Writ was set aside for Irregularity (a).

That the said writ was irregularly sued out, and before this suit by an order duly made by one of the judges of the said court the said writ and all subsequent proceedings thereon were set aside for irregularity.

Like replications: to a plea justifying under a fi. fa.: Jones v. *Williams*, 8 M. & W. 349; *Rankin* v. *De Medina*, 1 C. B. 183; *Prentice* v. *Harrison*, 4 Q. B. 852; *to a plea justifying under a ca. sa.: Collett* v. *Foster*, 2 H. & N. 356; 26 L. J. Ex. 412; *to a plea justifying under a capias on mesne process: Codrington* v. *Lloyd*, 8 A. & E. 449.

Replications to Pleas justifying under Process:

That the judgment and writ were set aside by a judge's order on the ground that the judgment was signed against good faith upon a warrant of attorney obtained from the plaintiff by fraud: Brown v. *Jones*, 15 M. & W. 192. [*As to arrest on mesne process against good faith, see Stein* v. *Valkenhuysen*, 27 L. J. Q. B. 236.]

That a writ of error issued and was duly allowed, of which notice was given to the sheriff: Belshaw v. *Marshall*, 4 B. & Ad. 336; *and see now C. L. P. Act*, 1852, *s.* 150.

That the execution creditor countermanded the execution of the writ: Walker v. *Hunter*, 2 C. B. 324; *and see Barker* v. *St. Quintin*, 12 M. & W. 441; *Hunt* v. *Hooper*, 1 D. & L. 626.

Replication that the plaintiff paid the debt, and gave notice to the sheriff and his bailiff: Futcher v. *Hinder*, 28 L. J. Ex. 28.

Replication to a justification under a fi. fa. that it was issued upon a judgment signed under a warrant of attorney given by way of fraudulent preference: Aldred v. *Constable*, 6 Q. B. 370; *Rawdon* v. *Wentworth*, 10 M. & W. 36.

Replication, to a plea justifying under a judgment and a writ of ca. sa., that the judgment was for a sum less than £20 (*under 7 & 8 Vict. c.* 96, *s.* 57): *Brooks* v. *Hodgkinson*, 29 L. J. Ex. 93; 4 H. & N. 712. [*In this case a rejoinder that the writ had not been set aside was held bad.*]

Replication to a plea justifying under a ca. sa. that the defendant broke open the outer door of plaintiff's house in order to execute it: Newton v. *Holford*, 1 C. B. 141; *and see Kerbey* v. *Denby*, 1 M. & W. 336; *and see Sandon* v. *Jervis*, 27 L. J. Q. B. 279.

(*a*) Where a judgment or process under which the plea justifies has been set aside for irregularity or some other ground, the replication of *nul tiel record*, or in denial of the process, is improper (*Brown* v. *Jones*, 15 M. & W. 192; but see per Bramwell, B., *Collett* v. *Foster*, 26 L. J. Ex. 414; 2 H. & N. 356); and so is a new assignment. (*Oakley* v. *Davis*, 16 East, 82.) The replication should plead specially that the process has been set aside, and it should also state the grounds on which it was set aside, that it may appear on the face of the replication that it was illegal at the time of execution. (*Prentice* v. *Harrison*, 4 Q. B. 852; and see as to this replication, *Rankin v. De Medina*, 1 C. B. 183.)

PUBLIC HEALTH. See *ante*, p. 336.

RELEASE. See *ante*, "*Release*," p. 565.

RELINQUISHMENT OF PLEA. See *ante*, pp. 556, 568.

REPLEVIN.

Plea traversing the taking (*non cepit* (*a*)).

That he did not take the said goods [*or* cattle, *or as the case may be*] or any of them as alleged.

A like plea, with suggestion that the defendant took them in another place in respect of which he avows: Bullythorpe v. *Turner*, Willes, 475.

(*a*) The general issue in replevin *non cepit* denies the taking of the cattle or goods and the taking in the place alleged. The defendant cannot have judgment for the return of the goods under this plea; to obtain this he must plead so as to show that he is entitled to a return. (Com. Dig. tit. Pl. 3 K. 12, 13.)

The plaintiff must be entitled to a possessory property in the goods in order to maintain replevin; and the property in the goods must be specifically denied. The plea in denial must also go on to aver a property in the defendant in order to entitle him to a judgment for a return of the goods. (Com. Dig. Pl. 3 K. 13.)

Where the defendant confesses the taking, but justifies it for lawful cause, as a distress for rent, he does so by an *avowry* or *cognizance*. An *avowry* is a justification in his own right; a *cognizance*, a justification in the right of another. (Com. Dig. Pl. 3 K. 13, 14.) The plaintiff's pleading in answer to the avowry or cognizance is called a *plea in bar*. And the subsequent pleadings are called the *replication*, *rejoinder*, etc., the ordinary names of the pleadings being thus postponed one step. (Com. Dig. Pl. 3 K. 16; Steph. Pl. 6th ed. 169 (*p*).)

The object of pleading in the form of an avowry or cognizance is to obtain a judgment for the return of the goods. (Com. Dig. Pl. 3 K. 13.) The defendant may plead a justification in the ordinary form without making avowry or cognizance. (Com. Dig. Pl. 3 K. 12; *Morrell* v. *Martin*, 3 M. & G. 581.)

By the C. L. P. Act, 1852, s. 67, no formal defence shall be required in an avowry or cognizance, and it shall commence in the form there given (see form *ante*, p. 373), and no formal conclusion shall be necessary.

By the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 23, it is enacted "that the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise as upon a payment into court by a defendant in other actions." And by s. 24, "such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond."

The defendant cannot have a return of the goods under *non cepit*. In

Plea denying the Plaintiff's Property in the Goods, and claiming Property in the Defendant (a).

That the said goods were the goods of the defendant and not of the plaintiff as alleged.

Avowry for Rent in Arrear from the Plaintiff (b).

That the plaintiff, during all the time for which the rent hereinafter mentioned to be distrained for accrued due, and thence until and at the time of the alleged taking of the said goods, held the said dwelling-house as tenant thereof to the defendant under a demise thereof at the yearly rent of £——, payable half-yearly on the —— day of ——, and on the —— day of —— in every year by equal portions; and because £—— of the said rent at the time of the alleged taking was due and in arrear from the plaintiff to the defendant, the defendant well avows the taking of the said goods in the said dwelling-house and justly, etc., as a distress for the said rent which still remains due and unpaid.

Cognizance for rent in like case: Daniel v. *Gracie*, 6 Q. B. 145.

Avowry and cognizance pleaded together: Banks v. *Angell*, 7 A. & E. 843.

Avowries justifying separately in respect of a house and a close: Phillips v. *Whitsed*, 29 L. J. Q. B. 164. [*A plea in bar that one joint distress was taken was held bad, as it did not show that more was taken than was due on either. Ib.*]

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order to have a return of the goods he may add by way of suggestion that he took them in another place, and avow in respect of such taking; and the plaintiff cannot dispute this suggestion, but can only take issue on the traverse of the place of taking. (1 Wms. Saund. 347 (1); *Bullythorpe* v. *Turner*, Willes, 475.)

(*a*) Under this plea the defendant is entitled to a return of the goods without an avowry. (Com. Dig. Pl. 3 K. 13.)

(*b*) In replevin, the avowry or cognizance must in general show a good title in order to give the defendant a return of the goods. (1 Wms. Saund. 347 *c*; 2 Wms. Saund. 285(3); *Hawkins* v. *Eckles*, 2 B. & P. 359; 361 *a*.) But in the case of a distress for rent a general form of avowry or cognizance, without setting forth the title of the landlord or lessor, is allowed by the statute 11 Geo. II. c. 19, s. 22, which enacts that it "shall be lawful for all defendants in replevin to avow or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then due and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for was at the time of such distress and still remains due, without further setting forth the grant, tenure, demise or title of such landlord or landlords, lessor or lessors, owner or owners of such manor, any law or usage to the contrary notwithstanding; and if the plaintiff in such action shall become nonsuit, discontinue his action, or have judgment given against him, the defendant in such replevin shall recover double costs of suit."

A person entitled to distrain is not bound by the cause of the distress alleged at the time of making it, but may in his avowry set up any sufficient ground of justification. (*Phillips* v. *Whitsed*, 29 L. J. Q. B. 164.)

Cognizance for Rent in Arrear under a Demise to a third Party.

That *J. K.*, during all the time for which the rent hereinafter mentioned to be distrained for accrued due, and thence until and at the time of the alleged taking of the said goods, held the said dwelling-house as tenant thereof to *L. M.* under a demise thereof at the yearly rent of £——, payable half-yearly on the —— day of ——, and the —— day of ——, in every year by equal portions; and because £—— of the said rent at the time of the alleged taking was due and in arrear from the said *J. K.* to the said *L. M.*, the defendant, as bailiff of the said *L. M.*, well acknowledges the taking of the said goods in the said dwelling-house and justly, etc., as a distress for the rent so due and in arrear as aforesaid, which still remains due and unpaid.

Avowry by a joint tenant or a tenant in common for part of the rent: Philpott v. *Dobbinson*, 6 Bing. 104; *Downs* v. *Cooper*, 2 Q. B. 256.

By the assignee of the reversion for an apportioned part of rent: Roberts v. *Snell*, 1 M. & G. 577.

By a receiver in Chancery of the rents: Dancer v. *Hastings*, 4 Bing. 2; *Evans* v. *Matthias*, 26 L. J. Q. B. 309; *Jolly* v. *Arbuthnot*, 28 L. J. C. 274.

Cognizance by a mortgagor in possession as bailiff of the mortgagee: Trent v. *Hunt*, 9 Ex. 14.

Avowry by executors for rent due to the testator under 32 *Hen. VIII. c.* 37: *Staniford* v. *Sinclair*, 2 Bing. 193; *Prescott* v. *Boucher*, 3 B. & Ad. 849; *Whitehead* v. *Taylor*, 10 A. & E. 210; *Evans* v. *Elliot*, 9 A. & E. 342.

Avowry for a distress taken after the expiration of the tenancy under 8 *Anne, c.* 14, *s.* 6: *Williams* v. *Stiven*, 9 Q. B. 14.

Avowry and cognizance for double rent for holding over after notice to quit, under 11 *Geo. II. c.* 19, *s.* 18: *Johnstone v. Huddlestone*, 4 B. & C. 922; *Humberstone* v. *Dubois*, 10 M. & W. 765.

Cognizance for a distress taken for a fee farm rent, under 4 *Geo. II. c.* 28, *s.* 5: *Musgrave* v. *Emmerson*, 10 Q. B. 326.

Avowry for a distress for a tithe rent-charge under the Tithe Commutation Act, 6 *& 7 Will. IV. c.* 71: *Sharpe* v. *Bluck*, 10 Q. B. 280.

Avowry for a rent-charge in lieu of tithes under a local Act: Lancaster and Carlisle Railway Co. v. *Heaton*, 27 L. J. Q. B. 195; 8 E. & B. 952.

Avowry for arrears of land tax redeemed under the statute 42 *Geo. III. c.* 116, *s.* 69: *Warner* v. *Potchett*, 3 B. & Ad. 921.

Avowry for an annuity charged by will on land recoverable by

distress: James v. *Salter*, 2 Bing. N. C. 505; 3 Bing. N. C. 544; *Caunt* v. *Ward*, 7 Bing. 608; *Owens* v. *Wynne*, 4 E. & B. 579.

Avowry and cognizance for an annuity secured by a power of distress: Miller v. *Green*, 8 Bing. 92; *Hogarth* v. *Penny*, 14 M. & W. 494.

Avowry for an annuity granted pur autre vie, by the executor of the grantee: Bearpark v. *Hutchinson*, 7 Bing. 178; *Johnson* v. *Faulkner*, 2 Q. B. 925.

Avowry for interest on a mortgage debt, recoverable by distress under the mortgage deed: Chapman v. *Beecham*, 3 Q. B. 727.

Avowry for rent-charge by way of jointure: Jamieson v. *Trevelyan*, 10 Ex. 269.

Avowry and cognizance for rent reserved on an estate tail: Vigers v. *Dean of St. Paul's*, 14 Q. B. 909.

Plea in Bar, to an Avowry for Rent, traversing the Tenancy (*a*).

That the plaintiff did not hold the said dwelling-house as tenant thereof to the defendant as alleged.

Plea in bar, to an avowry for rent, that the defendant, a termor, granted all his interest in the premises to the plaintiff, reserving no reversionary interest enabling him to distrain: Smith v. *Mapleback*, 1 T. R. 445; *Preece* v. *Corrie*, 5 Bing. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898 (*b*).

(*a*) It would seem that the plaintiff in replevin cannot deny the whole of an avowry or cognizance by taking issue thereon, or by any general denial. The C. L. P. Act, 1852, ss. 77, 78, 79, giving the liberty to traverse the whole of any plea or subsequent pleading by a general denial, does not specify an avowry or cognizance in terms, whilst other sections of the statute which are intended to apply to avowries and cognizances mention them particularly by name, see ss. 67, 83. There is reason for supposing that it was not intended to include them in the above enactment, for an avowry or cognizance is in the nature of a claim by the defendant entitling him to the return of the goods, to which it may therefore be said the plaintiff should plead specially as to a declaration. In the case of *Trent* v. *Hunt*, 9 Ex. 14, the plaintiff pleaded in bar a general denial of the cognizance without objection being taken; but the Court of Exchequer, in delivering judgment, observed that a judge upon application made to him under the provisions of the C. L. P. Act would most probably have compelled the plaintiff to plead separate traverses, and would not have allowed him to mix up the denial of the tenancy and of the rent being in arrear and of the authority to distrain in one general traverse.

Plaintiffs in replevin may plead several matters in bar to an avowry or cognizance, by the statute 4 Anne, c. 16, s. 4.

(*b*) Where a termor transfers his whole interest in the term reserving a rent or makes an underlease for a term, and afterwards parts with the reversion reserving the rent to himself, there is no remedy by distress at common law; and the statute 4 Geo. II. c. 28, s. 5, giving a power of distress for a rent-seek, is held not to be applicable. (See the cases cited above; but see *Pluck* v. *Digges*, 2 Hud. & Bro. 15; Bullen on Distress, Ap. A.)

A plea in bar that the landlord had no title to the premises at the time of the demise (*nil habuit in tenementis*), or any plea in substance amounting to the same thing, is bad. (*Alchorne* v. *Gomme*, 2 Bing. 54; *Wheeler* v. *Branscombe*, 5 Q. B. 373; and see *Evans* v. *Elliot*, 9 A. & E. 342.) But the tenant may deny the landlord's reversion and right to distrain. (See *Hooker*

Plea in Bar, to a Cognizance for Rent, traversing that the Defendant was Bailiff.

That the defendant was not the bailiff of the said *J. K.* as alleged.

Plea in Bar, to an Avowry or Cognizance for Rent, of Riens in Arrear (a).

That no part of the rent in the said avowry [*or* cognizance] mentioned was in arrear from the plaintiff to the defendant [*or* to the said *J. K.*] as alleged.

Plea in bar, to an avowry for rent, of tender of rent and expenses before impounding: Evans v. *Elliot*, 5 A. & E. 142; *Thomas* v. *Harries*, 1 M. & G. 695; *Tennant* v. *Field*, 27 L. J. Q. B. 33; 8 E. & B. 336; *see ante, p.* 277 (*a*).

Replication of tender to a plea justifying taking goods as a distress for tolls: Field v. *Newport Ry. Co.*, 27 L. J. Ex. 396; 3 H. & N. 409; *where see also a replication that no demand was made for the tolls due before the distress:* Ib.

Plea in bar, to an avowry for rent, of a release of the rent before the taking: Cooper v. *Robinson*, 10 M. & W. 694.

Pleas in Bar, that the Goods were privileged from Distress:

That the goods taken were beasts of the plough and instruments of husbandry: Davies v. *Aston*, 1 C. B. 746.

Replication, to a plea justifying taking the plaintiff's goods on the premises of the defendant's tenant under a distress for rent, that the goods were delivered by the plaintiff to the tenant to be manufactured in the way of his trade: Gibson v. *Ireson*, 3 Q. B. 39.

A like replication that the goods were delivered by the plaintiff to

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v. *Nye*, 1 C. M. & R. 258, 260.) If the demise was under seal, the lessee might be estopped by its terms from denying the reversion of the lessor, (See *ante*, p. 540.)

(*a*) This plea in bar is in the nature of a general issue to an avowry or cognizance, and under it the plaintiff may show that no rent was ever due, or that it was paid and satisfied before the distress.

He may give evidence of compulsory payments of ground-rent or other charges on the land paramount to the claim of the landlord, and a special plea stating such payments is unnecessary. (*Jones* v. *Morris*, 3 Ex. 742.) Such payments have sometimes been specially pleaded, as in the following cases: payment of rent to the ground-landlord (*Sapsford* v. *Fletcher*, 4 T. R. 511); payment of the land-tax (*Stubbs* v. *Parsons*, 3 B. & Ald. 516); payment of the income-tax (*Franklin* v. *Carter*, 1 C. B. 750; *Taylor* v. *Evans*, 25 L. J. Ex. 269; 1 H. & N. 101; *Clennel* v. *Read*, 7 Taunt. 50); payment to a mortgagee claiming under a mortgage prior to the demise to the plaintiff (*Johnson* v. *Jones*, 9 A. & E. 809; *Dyer* v. *Bowley*, 2 Bing. 94); payment under a distress of an annuity charged on the land by the landlord prior to the demise (*Taylor* v. *Zamira*, 6 Taunt. 524).

As to the admissibility of a plea of *riens in arrear* in actions of debt or covenant for rent, see *ante*, p. 536, n. (*b*).

the tenant as a commission agent to be sold: Findon v. *M'Laren*, 6 Q. B. 891.

A like replication in an action for seizing the plaintiff's boat, that it was sent on to the tenant's premises for the purpose of carrying away goods sold by the tenant to the plaintiff (held, a bad replication): Muspratt v. *Gregory*, 1 M. & W. 633; 3 M. & W. 677.

Plea in bar of a previous distress taken for the same rent: Owens v. *Wynne*, 4 E. & B. 579.

A like plea to an action of trespass, and replication that the plaintiff forcibly kept possession of the first distress, and so rendered it abortive: Lee v. *Cooke*, 27 L. J. Ex. 337; 2 H. & N. 584.

Replication to a plea justifying the taking of goods under a distress, that the goods had been previously taken under a writ of fi. fa. and were in custodiâ legis: Wharton v. *Naylor*, 12 Q. B. 673.

Plea in bar, to an avowry for rent, of an eviction before the alleged rent became due: See "Landlord and Tenant," ante, p. 539.

Avowry by a Freeholder for a Distress damage feasant (*a*).

That at the time of the alleged taking of the said [cattle], the said close was the close and freehold of the defendant, and because the said [cattle] were then wrongfully in the said close doing damage there to the defendant, the defendant well avows the taking of the said cattle in the said close and justly, etc., as a distress for the said damage.

Avowry by a Tenant for a Distress damage feasant.

That before the alleged taking of the said [cattle] *J. K.* being seised in fee of the said close demised the same for the term of —— years to the defendant, and by virtue of the said demise the defendant entered into the said close and became and until and at the time of the alleged taking of the said [cattle] was possessed thereof; and because the said [cattle] were then wrongfully in the said close doing damage there to the defendant, the defendant well avows the taking of the said cattle in the said close and justly, etc., as a distress for the said damage.

Avowry and cognizance for a distress taken damage feasant on a spot where the defendant had common of pasture: Jones v. *Richard*, 5 A. & E. 413; *Prichard* v. *Powell*, 10 Q. B. 589.

(*a*) In an avowry or cognizance for distress damage feasant it is necessary to plead the defendant's title, and it is not sufficient for him to plead merely that he was possessed as he might do if plaintiff in an action of trespass. (1 Wms. Saund. 347 *e* (6); 2 Ib. 285 (3).) It is sufficient to plead that the close was his freehold, without stating whether he was seized in fee, in tail, or for life. (Ib.) The general form of avowry for a distress for rent given by the statute 11 Geo. II. c. 19, s. 22 (*ante*, 655, n. (*b*)), does not extend to a distress damage feasant.

Plea in Bar, to an Avowry for a Distress damage feasant, traversing the Defendant's Title.

That the said close was not the close and freehold of the defendant [*or* of the said *J. K.*] as alleged.

Plea in bar, to an avowry for a distress damage feasant, of a right of common of pasture by prescription: Jones v. *Richard*, 5 A. & E. 413; *Warburton* v. *Parke*, 26 L. J. Ex. 298; 2 H. & N. 64.

Plea in bar of the plaintiff's right of common of pasture pur cause de vicinage: Prichard v. *Powell*, 10 Q. B. 589; *Heath* v. *Elliott*, 4 Bing. N. C. 388.

Plea in bar that plaintiff's cattle strayed on to defendant's close through defects of fences which it was his duty to repair: Bailey v. *Appleyard*, 8 A. & E. 161; *and see Carruthers* v. *Hollis*, 8 A. & E. 113; *Singleton* v. *Williamson*, 31 L. J. Ex. 17.

And see replications to pleas justifying the taking of goods as a distress damage feasant, ante, "Distress," p. 620.

Avowries and Cognizances for Rates, Taxes, etc.:

Avowry and cognizance by overseers and bailiff under a warrant to distrain for poor-rates: Bardons v. *Selby*, 3 B. & Ad. 2; 9 Bing. 756; 1 C. & M. 500; *Skingley* v. *Surridge*, 11 M. & W. 503.

Avowry by overseers under several warrants for poor-rates, some of which were good and some bad: Bristol v. *Wait*, 1 A. & E. 264; *Sibbald* v. *Roderick*, 11 A. & E. 38.

Cognizance as bailiff of commissioners of sewers for sewers-rates: Ramsey v. *Nornabell*, 11 A. & E. 383; *Lee* v. *Cooke*, 27 L. J. Ex. 337; 3 H. & N. 203; *Wingate* v. *Waite*, 6 M. & W. 739; *under a local Act: Mattison* v. *Hart*, 14 C. B. 357.

Plea of justification by a constable under a warrant of justices to levy a highway-rate by distress: Morrell v. *Martin*, 6 Bing. N. C. 373; 3 M. & G. 581; *see Fawcett* v. *Fowlis*, 7 B. & C. 394.

Cognizance by a constable under a similar warrant: Morell v. *Harvey*, 4 A. & E. 684; *for levying a gas rent: Painter* v. *Liverpool Gas Co.*, 3 A. & E. 433.

Plea of justification by justices under an order for costs made by them upon a surveyor of turnpike roads and which costs were levied by distress: George v. *Chambers*, 11 M. & W. 149.

Avowry by the officer of a court under a warrant to levy a fine: Aldridge v. *Haines*, 2 B. & Ad. 395; *Frost* v. *Lloyd*, 9 Q. B. 130.

Avowry by the collector of assessed taxes under a warrant from the commissioners: Allen v. *Sharp*, 2 Ex. 352.

Plea in Bar of Payment into Court (C. L. P. Act, 1860, s. 23, ante, p. 654).

The plaintiff as to the avowry [*or* cognizance] of the defendant by him above pleaded brings into court the sum of £——, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Replications to plea of payment into court: ante, p. 647.

REVERSION.

General Issue (*a*).

"Not guilty," *ante, p.* 589.

Plea traversing the Possession of the Plaintiff's Tenant.

That the said land [*or* dwelling-house] was not in the possession of the said *G. H.* as tenant thereof to the plaintiff as alleged.

Plea traversing the Plaintiff's Reversion.

That the reversion of the said land [*or* dwelling-house] did not belong to the plaintiff as alleged.

Plea, in an Action by a Landlord against his Tenant for removing Fixtures, justifying the Removal of them as Tenant's Fixtures.

That the said fixtures were tenant's fixtures belonging to the defendant, which he as tenant of the said dwelling-house was lawfully entitled to pull down and remove during his tenancy of the said dwelling-house; and the defendant during his said tenancy carefully pulled down and removed the same, and in so doing unavoidably a little damaged the walls of the said dwelling-house, doing no unnecessary damage thereto, and the defendant before the end of his said tenancy repaired and restored the said walls, which are the alleged grievances.

Like pleas in respect of trade fixtures and ornamental fixtures, post, "*Waste,*" *p.* 680.

SEDUCTION. See *ante,* "*Master and Servant,*" p. 632.

SHERIFF.

General Issue (*b*).

"Not guilty," *ante,* p. 589.

(*a*) In an action by a reversioner for an injury done to his reversion in land demised to a tenant, the plea of not guilty denies the injurious act, and the fact that damage was thereby caused to the reversion. (*Young* v. *Spencer,* 10 B. & C. 145; *Kidgill* v. *Moor,* 9 C. B. 365.) It admits the demise, the tenancy, and the reversionary interest of the plaintiff. (*Raine* v. *Alderson,* 4 Bing. N. C. 702; *Grenfell* v. *Edgcome,* 7 Q. B. 661.) In an action by a reversioner for waste in not keeping premises in repair, not guilty puts in issue only the want of repair, and not the wrongfulness of it. (*Bacon* v. *Smith,* 1 Q. B. 345, 346.) The tenancy and the reversionary title of the plaintiff must, if denied, be traversed in terms.

(*b*) In actions against the sheriff for negligence or default of duty, the

Plea denying the Judgment.

"Nul Tiel Record," see *ante*, p. 528.

Plea traversing the Process.

That the plaintiff did not sue out a writ of fieri facias [*or* capias *or* capias ad satisfaciendum, *as the case may be*] as alleged.

Plea traversing the Delivery of the Process to the Defendant.

That the plaintiff did not cause the said writ to be delivered to the defendant as alleged.

Plea traversing that there were any Goods within the Bailiwick.

That there were not at or after the delivery of the said writ to him any goods or chattels of the said *G. H.* within the said bailiwick of the defendant, whereof the defendant could and ought to

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plea of not guilty denies the neglect or default alleged, but admits all the preliminary proceedings stated as matters of inducement. (r. 16, T. T. 1853.) Thus in an action for not levying under a *fi. fa.*, the plea of not guilty denies the default in levying, but admits the judgment, the writ, the indorsement, the delivery to the sheriff, that goods were in the possession of the debtor, and that the defendant was sheriff. In an action for making a false return to a writ of *fi. fa.* it denies that the sheriff made the return alleged, but admits all the matters above-mentioned, and also that he levied the money, if stated in the declaration. (*Wright* v. *Lainson*, 2 M. & W. 739; *Lewis* v. *Alcock*, 3 M. & W. 188; *Rowe* v. *Ames*, 6 M. & W. 747.)

By r. 16, T. T. 1853, "In actions for an escape it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings." Under a count charging an escape, and not guilty pleaded, the plaintiff was allowed to prove a negligent omission to arrest when the defendant had an opportunity. (*Guest* v. *Elwes*, 5 A. & E. 118.) Under this plea the defendant may show that a special bailiff was appointed at the request of the plaintiff. (*Ford* v. *Leche*, 6 A. & E. 699; and see *ante*, p. 341.) So he may show that he discharged the prisoner upon the production of an interim protection order of the Insolvent Court. (*Wallinger* v. *Gurney*, 11 C. B. N. S. 182; 31 L. J. C. P. 55.)

In an action for neglecting to arrest and returning *non est inventus*, under not guilty the sheriff cannot prove leave and licence from the plaintiff not to arrest. (*Howden* v. *Standish*, 6 C. B. 504.)

Actions against the sheriff for negligence or default of duty or a false return, except in the execution of final process against the person, can only be maintained in respect of actual damage thereby caused to the plaintiff; therefore the plea of not guilty in such actions puts in issue the actual damage as well as the act of default or negligence causing it. (*Wylie* v. *Birch*, 4 Q. B. 566; *Bales* v. *Wingfield*, ib. 580 n.) In actions for default in arresting or for an escape on final process, it puts in issue the negligence or default only; and the plaintiff is entitled to nominal damages although no actual damage be proved. (See *ante*, p. 341, 346.)

All matters of inducement, the debt, the judgment, the writ, the indorsement, the delivery of it to the sheriff, the levy, that the defendant was sheriff, etc., if denied, must be traversed in terms. The judgment is put in issue by the plea of *nul tiel record*. (*Ante*, p. 528.)

have levied the money and interest indorsed on the said writ as alleged.

Special plea that there were not sufficient goods to satisfy previous writs and the landlord's rent: Cocker v. *Musgrove*, 9 Q. B. 223. [*The above traverse would be sufficient: Wintle* v. *Freeman*, 11 A. & E. 539.]

Plea traversing the Levy (*a*).

That he did not by virtue of the said writ levy of the goods or chattels of the said *G. H.* the money and interest indorsed on the said writ or any part thereof as alleged.

Plea that the Plaintiff countermanded the Writ (*b*).

That after the delivery of the said writ to him, and before the alleged grievance, the plaintiff countermanded the said writ and ordered the defendant not to levy the said money or interest under the said writ, and discharged him from executing the same.

Plea traversing the Debt of the Execution Debtor (*c*).

That the said *G. H.* was not indebted to the plaintiff in a sum exceeding £20 as alleged.

(*a*) This plea is proper where there were previous writs or claims against the goods which exhausted the levy, so that no part remained applicable to the plaintiff's writ. (*Heenan* v. *Evans*, 3 M. & G. 398; *Drewe* v. *Lainson*, 11 A. & E. 538; *Wintle* v. *Freeman*, 11 A. & E. 539; *Imray* v. *Magnay*, 11 M. & W. 273.) Under this plea the sheriff may show that the plaintiff's judgment was obtained by fraud and that he paid the proceeds of the execution to another execution creditor under a writ subsequent to the plaintiff's. (*Shattock* v. *Carden*, 6 Ex. 725.)

The sheriff is not estopped by the matters of excuse alleged in his return, but may account differently according to the fact for the disposal of the goods or proceeds, so as to show that the plaintiff sustained no damage. (*Remmett* v. *Lawrence*, 15 Q. B. 1004; *Levy* v. *Hale*, 29 L. J. C. P. 127.)

(*b*) This defence must be pleaded specially and cannot be proved under not guilty. (*Hodges* v. *Paterson*, 26 L. J. Ex. 223.) A plea that the defendant discharged a prisoner by the authority of the plaintiff's attorney was formerly bad (*Sadory* v. *Chapman*, 11 A. & E. 829: and see *Connop* v. *Challis*, 2 Ex. 484); but now by the C. L. P. Act, 1852, s. 126, it is enacted that "a written order under the hand of the attorney in the cause, by whom any writ of *capias ad satisfaciendum* shall have been issued, shall justify the sheriff, gaoler, or person in whose custody the party may be under such writ in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to such sheriff, gaoler, or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor, and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client." (See a plea under this section, *Hodges* v. *Paterson*, *supra*.)

(*c*) In an action for an escape on mesne process the sheriff may deny the debt. (*Alexander* v. *Macauley*, 4 T. R. 611.) The admissions of the original debtor after the arrest and before the escape are evidence against the sheriff. (*Rogers* v. *Jones*, 7 B. & C. 86.) Where the escape is on final process, the sheriff may plead that the judgment was a nullity, wherever the judgment debtor might do so. (*Lane* v. *Chapman*, 11 A. & E. 966.)

Pleas in an Action for an Escape.

Traverses of the writ and delivery of it, the arrest, and the escape: *Jackson* v. *Hill*, 10 A. & E. 477.

That the prisoner was removed from the defendant's custody under a writ of habeas corpus and order thereon: *Contant* v. *Chapman*, 2 Q. B. 771.

That the prisoner was discharged by order of the Court of Bankruptcy: *Thomas* v. *Hudson*, 14 M. & W. 353.

That the defendant duly took a bail bond from the prisoner and assigned it to the plaintiff: *Holden* v. *Raphael*, 4 A. & E. 228.

That the plaintiff colluded in the escape: *Merry* v. *Chapman*, 10 A. & E. 516.

That the prisoner escaped without the knowledge of the defendant, and returned into custody before action: *Davis* v. *Chapman*, 5 Bing. N. C. 453; 2 M. & G. 921.

Plea of payment of part of the debt before action, and payment into court of the residue: *Hemming* v. *Hall*, 7 C. B. N. S. 487.

Pleas to a count by the landlord against the sheriff for the removal of goods taken in execution against the tenant without paying the landlord a year's rent:

That the execution debtor was not tenant to the plaintiff: *Riseley* v. *Ryle*, 11 M. & W. 16; *Gore* v. *Lloyd*, 12 M. & W. 465.

That the rent was not due: *Gore* v. *Lloyd*, 12 M. & W. 465; *Reed* v. *Thoyts*, 6 M. & W. 412.

That the defendant had no notice of the rent being due: *Reed* v. *Thyots*, 6 M. & W. 412.

Pleas by a sheriff justifying under process: see ante, "*Process*," *p.* 648.

Support.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Possession of the Land.

That the plaintiff was not possessed of the said land [with houses and other buildings erected and standing thereon, *or as the case may be, according to the allegation in the declaration,*] as alleged.

(*a*) The plea of the general issue, not guilty, operates as a denial of the wrongful act alleged to have been committed by the defendant, but not of the facts stated in the inducement, and no other defence than such denial is admissible under that plea (r. 16, T. T. 1853); the plaintiff's alleged property in the land, buildings, etc., and his right of support incident thereto, if disputed, must be traversed specifically. As to the right of support necessary to maintain the action, see *ante*, p. 349.

Plea traversing the Plaintiff's Right of Support.

That the plaintiff was not entitled to have the said land, houses and buildings supported by the land adjacent thereto, and by the soil and minerals under the said land, houses and buildings [*or as the case may be, according to the allegation in the declaration,*] as alleged.

Plea to an Action of Trespass justifying under a Right of Support and of Entry to maintain and repair the Support to Defendant's house.

That at the time of the alleged trespasses he was possessed of a dwelling-house adjoining the said close and wall of the plaintiff, and the respective occupiers of the said dwelling-house for twenty [*or* forty] years before this suit enjoyed as of right and without interruption the right and easement of having certain parts of the said dwelling-house built into and supported by certain parts of the said close and wall of the plaintiff, and of breaking and entering the said close and wall of the plaintiff for the purpose of repairing and maintaining the said parts of the said dwelling-house, and of doing there all things necessary in that behalf from time to time as occasion should require; and the alleged trespasses were an exercise by the defendant of the said right.

Tender of Amends (*a*).

Plea of Tender of Amends under a Statute.

That the alleged trespasses [*or* grievances] were committed by him under and by virtue of [*or* in pursuance of, *according to the words of the statute*] the statute passed in the —— year of the reign of —— for [*here recite the title of the Act*]; and after the alleged trespasses [*or* grievances] and before action the defendant tendered and

(*a*) Tender of amends is no defence at common law in an action for a wrong. It is made a defence in some cases by particular statutes, of which the following are instances:—

By the 24 & 25 Vict. c. 96 (consolidating the statute law relating to larceny), s. 113, the 24 & 25 Vict. c. 97 (consolidating the statute law relating to malicious injuries to property), s. 71, and the 24 & 25 Vict. c. 99 (consolidating the statute law against offences relating to the coin), s. 33, no plaintiff shall recover in any action for anything done in pursuance of any of those acts if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and the defence may be relied on under the plea of the general issue by statute.

Tender of amends may be made and the defence relied on under the general issue by statute, in actions by a tenant or lessee for any unlawful act or irregularity in making or disposing of a distress under 11 Geo. II. c. 19; ss. 20, 21, cited *ante*, p. 618. In actions against justices of the peace, by 11 & 12 Vict. c. 44, s. 11, see *ante*, p. 300; in actions against police constables, see *ante*, p. 334; in actions for anything done under the Highway Act, see *ante*, p. 293; under the County Courts Act, see *ante*, p. 261.

Tender of amends may be made and pleaded as a defence in actions

offered to pay to the plaintiff £—— as amends for the said trespasses [*or* grievances], the same being enough to satisfy the claim of the plaintiff in respect of the causes of action herein pleaded to, and the plaintiff refused to accept the same.

Plea, in an Action for Trespass by Defendant's Cattle on Plaintiff's Land, of Disclaimer of Title and Tender of Amends. (21 *Jac. I.* c. 16, *s.* 5) (*a*).

That he never had and disclaims to have any title or interest in the said close, and that the said cattle of the defendant without his knowledge and against his will strayed into the said close, which is the alleged trespass; and afterwards and before action the defendant tendered and offered to pay to the plaintiff £—— as amends for the alleged trespass, the same being enough to satisfy the claim of the plaintiff in respect thereof, and the plaintiff refused to accept the same,

A like plea: Williams v. *Price*, 3 B. & Ad. 695.

Trespass: I. to the Person.

General Issue (*b*).

"Not guilty," *ante*, p. 589.

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against revenue officers by 8 & 9 Vict. c. 87, s. 119; and may be made and pleaded as a defence in actions for anything done under the Metropolitan Local Management Acts, by 25 & 26 Vict. c. 102, s. 106; or under the Public Health Act, or Local Government Act. See *ante*, p. 336 (*a*).

Where a statute makes a tender of amends a sufficient answer to an action, it is not necessary for the defendant to pay the money into court, unless the statute requires it in addition to the tender. (*Jones* v. *Gooday*, 9 M. & W. 736, 745.)

(*a*) By the 21 Jac. I. c. 16, s. 5, it is enacted that "in all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them the plaintiff shall be enforced to join issue; and if the said issue be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action or actions, and all other suits concerning the same." This statute applies only to such trespasses as are involuntary, and does not include voluntary trespasses though committed by mistake; thus in an action of trespass for cutting the plaintiff's grass, a plea that the defendant cut it by mistake for his own, with a disclaimer of title and tender of amends under the statute, was held a bad plea, because the act was voluntary. (*Basely* v. *Clarkson*, 3 Lev. 37.) The statute does not apply in actions for taking away goods. (*Bailee* v. *Vivash*, 1 Strange, 549; and see *Thompson* v. *Jackson*, 1 M. & G. 242, 245 (*a*).

(*b*) The plea of *not guilty* operates only as a denial of the wrongful act alleged to have been committed by the defendant; and no other defence

Plea of Self-Defence (or, son Assault Demesne). (C. L. P. Act, 1852, Sched. B. 45) (a).

That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault [*or* trespass *or* did what is complained of] in his own defence.

Replication to a Plea of Self-Defence that the Plaintiff first assaulted the Defendant in Defence of his Land. (C. L. P. Act, 1852, Sched. B. 53.)

That the plaintiff was possessed of land whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do, and thereupon the plaintiff gently laid his hands on the defendant in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff.

Plea, to a count for a trespass, that it was caused by the plaintiff's own negligence: see ante, "*Negligence,*" p. 636.

Plea, to a count for a trespass by a collision, that it was caused by the plaintiff's negligent driving: M'Laughlin v. *Pryor,* 4 M. & G. 48.

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than such denial is admissible under that plea. (r. 16 T. T. 1853.) As to what amounts to a trespass, see *ante,* p. 353.

Under the issue raised by this plea the defendant may prove that the act complained of was involuntary, as being the result of accident, or of some agency over which he had no control, so as not to be his act. (*Gibbons* v. *Pepper,* 1 L. Raym. 38; *Hall* v. *Fearnley,* 3 Q. B. 919; *Wakeman* v. *Robinson,* 1 Bing. 213.) The act may be a trespass though unintentional. (*Covell* v. *Laming,* 1 Camp. 497.) Touching a person for the purpose of calling his attention is not sufficient to justify giving him into custody on the charge of an assault. (*Coward* v. *Baddeley,* 28 L. J. Ex. 260; 4 H. & N. 478.)

An act done by an officer, by the authority of the crown, is an act of state for which he is not responsible, and the defence may be shown under the general issue (*Buron* v. *Denman,* 2 Ex. 167); so the acts of a judge within his jurisdiction are not trespasses and may be justified under the general issue. (*Dicas* v. *Lord Brougham,* 6 C. & P. 249, and see *ante,* p. 300.)

In an action for an assault, and it seems also in an action for a false imprisonment, the defence of leave and licence may be given in evidence under this plea (*Christopherson* v. *Bare,* 11 Q. B. 473, see *ante,* p. 624); but any defence which admits that the act was a trespass and that it was the act of the defendant, must be pleaded specially. (Ib.) Thus the defence that the plaintiff himself by negligence or otherwise contributed to or caused the injury must be specially pleaded. (Ib.; *Knapp* v. *Salsbury,* 2 Camp. 500.)

All matters of justification must be pleaded specially, and if not pleaded cannot be given in evidence even in mitigation of damages. Extenuating circumstances not amounting to a justification may be proved in order to reduce the damages without a plea. (*Linford* v. *Lake,* 27 L. J. Ex. 334; 3 H. & N 276.

(*a*) Under a replication taking issue on this form of plea the plaintiff may give evidence of excess (*Dean* v. *Taylor,* 11 Ex. 68); which he could not do under a general traverse to the form of plea in use before the C. L. P. Act, 1852. (*Penn* v. *Ward,* 2 C. M. & R. 338.) As to the effect of a replication or new assignment of excess, see *ante,* p. 637.

Plea of Justification by two Defendants, Master and Servant, in Defence of the Master's Land.

That at the time of the alleged trespass the defendant *E. F.* was possessed of land whereon the plaintiff was trespassing and doing damage, whereupon the defendant *E. F.* requested the plaintiff to leave the said land, which the plaintiff refused to do; and thereupon the defendant *E. F.* in his own right, and the defendant *G. H.* as the servant of the defendant *E. F.* and by his command, gently laid their hands on the plaintiff in order to remove him [and removed him] from the said land, doing no more than was necessary for that purpose, which is the alleged trespass.

Like pleas: Holmes v. *Bagge*, 1 E. & B. 782; 22 L. J. Q. B. 301; *Bush* v. *Parker*, 1 Bing. N. C. 72; *Piggott* v. *Kemp*, 1 C. & M. 197; *Hayling* v. *Okey*, 8 Ex. 531; *Morant* v. *Chamberlain*, 30 L. J. Ex. 299; 6 H. & N. 540.

Plea of Justification by the Defendant in Defence of his House (a).

That at the time of the alleged trespasses he was possessed of a dwelling-house wherein the plaintiff was trespassing and making a noise and disturbance, whereupon the defendant requested the plaintiff to cease from so doing and to leave the said house, which the plaintiff refused to do; and thereupon the defendant gently laid his hands on the plaintiff in order to remove him [and removed him] from the said house, doing no more than was necessary for that purpose, which are the alleged trespasses.

Like pleas: Timothy v. *Simpson*, 1 C. M. & R. 757; *Webster* v. *Watts*, 11 Q. B. 311.

Plea of Justification in Defence of the Possession of Goods.

That before and at the time of the alleged trespasses the plaintiff had wrongfully in his possession goods of the defendant [*or* of *J. K.*], that is to say (*naming the goods*), without the leave and against the will of the defendant [*or* of the said *J. K.*], and the plaintiff was then about wrongfully and unlawfully to take and carry away the said goods and convert them to his own use; and the defendant [as the servant of the said *J. K.* and by his command], then requested the plaintiff to refrain from carrying away and converting the said goods and to give up the possession thereof to the defendant, which the plaintiff then refused to do; and thereupon the defendant [as the

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(*a*) Neither this nor the preceding defences will justify excessive violence or an imprisonment; but the excess, if relied on by the plaintiff, must be replied or new assigned, unless it has been already charged as a distinct trespass in the declaration. (*Bush* v. *Parker*, 1 Bing. N. C. 72; *Oakes* v. *Wood*, 2 M. & W. 791; *ante*, "*New Assignment*," *p.* 553, 636.)

The owner of land is justified, as against a trespasser, in making, if necessary, a forcible entry and an assault for the purpose of recovering possession of his land, although he may thereby be guilty of a breach of the peace (*Harvey* v. *Brydges*, 14 M. & W. 437; and see *Blades* v. *Higgs*, 10 C. B. N. S. 713; 30 L. J. C. P. 347, 349; *Pollen* v. *Brewer*, 7 C. B. N. S. 371; *Taylor* v. *Cole*, 1 Smith L. C. 5th ed. 111); so also the owner of goods is justified in recovering the possession of them from another by force if necessary. (*Blades* v. *Higgs*, *supra*.)

servant of the said *J. K.* and by his command] gently laid his hands on the plaintiff in order to take [and took] the said goods from him, doing no more than was necessary for that purpose, which are the alleged trespasses.

Like pleas: Blades v. *Higgs*, 10 C. B. N. S. 713; 30 L. J. C. P. 347; *Morant* v. *Chamberlain*, 30 L. J. Ex. 299; 6 H. & N. 540.

Plea of justification of an assault in turning the plaintiff out of a public-house for disorderly conduct: Oakes v. *Wood*, 2 M. & W. 791; *Howell* v. *Jackson*, 6 C. & P. 723; *Ingle* v. *Bell*, 1 M. & W. 517; *Webster* v. *Watts*, 11 Q. B. 311.

Plea of justification of an assault by a landlord in turning a tenant out of his house after the expiration of the tenancy: Newton v. *Harland*, 1 M. & G. 644; *and see Harvey* v. *Brydges*, 14 M. & W. 437; *Davison* v. *Wilson*, 11 Q. B. 890.

Plea of justification of an assault in preventing the plaintiff from breaking into the defendant's house: Grant v. *Moser*, 5 M. & G. 123; *Weaver* v. *Bush*, 8 T. R. 78; *or into the defendant's close; Polkinhorn* v. *Wright*, 8 Q. B. 197; *Looker* v. *Halcomb*, 4 Bing. 183.

Plea of justification of an assault in expelling the plaintiff from a select vestry meeting as an intruder: Dobson v. *Fussy*, 7 Bing. 305.

Plea of justification of an assault in expelling the plaintiff from a church for indecent conduct: Hartley v. *Cook*, 9 Bing. 728; *Worth* v. *Terrington*, 13 M. & W. 781; *Williams* v. *Glenister*, 2 B. & C. 699.

Plea of justification of an assault by the minister of a church in turning the plaintiff, who was clerk to the church, out of the vestry-room after an order to leave it: Jackson v. *Courtenay*, 8 E. & B. 8.

Plea of justification of an assault by justices in turning the plaintiff out of their court: Collier v. *Hicks*, 2 B. & Ad. 663.

Plea of justification by a railway company of an assault in removing the plaintiff from the line: Manning v. *Eastern Counties Ry. Co.*, 12 M. & W. 237.

Plea of justification of an assault to prevent the plaintiff unlawfully rescuing a distress taken by the defendant: Field v. *Adames*, 12 A. & E. 649.

Plea justifying an Arrest and Imprisonment on Suspicion of Felony (*a*).

That before any of the alleged trespasses certain goods of the defendant were feloniously stolen by some person unknown to the defendant [and the said goods within —— days after they were so

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(*a*) The justification of an arrest and imprisonment on the ground of an offence having been committed differs in the case of a private individual and in that of a constable.

If a *private individual* states facts to a constable, who thereupon on his own responsibility arrests a person, or if he procures a magistrate to issue a warrant for taking a person, the imprisonment is not his act, and he may

stolen as aforesaid were found concealed in the house of the plaintiff, who thereupon falsely asserted that the said goods were his property, and that he had bought them of *J. K., stating the grounds of suspicion with particularity as above*]; whereupon the defendant then knowing the premises, and by reason thereof having reasonable and probable cause for suspecting, and suspecting that the plaintiff was the person who had feloniously stolen the said goods as aforesaid, gave the plaintiff into custody to a policeman duly authorized in that behalf, and caused the plaintiff to be imprisoned in a police station [*according to the allegations in the declaration*] in order that he might be dealt with according to law in respect of the premises, which are the alleged trespasses.

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show this under the plea of not guilty. (*Barber* v. *Rollinson*, 1 C. & M. 330; *Stonehouse* v. *Elliott*, 6 T. R. 315; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Grinham* v. *Willey*, 28 L. J. Ex. 242; 4 H. & N. 496.) A private individual is justified in himself arresting a person, or ordering him to be arrested, where a *felony* has been committed, and he has a reasonable ground of suspicion that the person arrested is guilty of it. (*Beckwith* v. *Philby*, 6 B. & C. 635; *Mathews* v. *Biddulph*, 3 M. & G. 390.) A private individual is justified in arresting persons committing a breach of the peace in his presence, or in giving them in charge to a constable at the time of the breach, and so long as there is danger of a renewal. (*Timothy* v. *Simpson*, 1 C. M. & R. 760; *Ingle* v. *Bell*, 1 M. & W. 516; *Grant* v. *Moser*, 5 M. & G. 123; *Raynes* v. *Brewster*, 2 Q. B. 375; *Price* v. *Seeley*, 10 Cl. & Fin. 28.) A private individual is not justified in arresting or causing to be arrested a person on a charge of *misdemeanour*, as for obtaining goods by false pretences (*Mathews* v. *Biddulph*, 3 M. & G. 390); except in the case of a breach of the peace under the circumstances above-mentioned.

A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a *felony* having been committed and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another. (*Beckwith* v. *Philby*, 6 B. & C. 635; *Hobbs* v. *Branscomb*, 3 Camp. 420; *Davies* v. *Russell*, 5 Bing. 354; *Hogg* v. *Ward*, 27 L. J. Ex. 443; 3 H. & N. 417.) A constable is not in general justified in arresting a person for a *misdemeanour* without a warrant; but he is justified in arresting without a warrant persons committing a breach of the peace in his presence (*Timothy* v. *Simpson*, 1 C. M. & R. 760; *Derecourt* v. *Corbishley*, 5 E. & B. 188); and whilst there is danger of a renewal (*Queen* v. *Light*, 27 L. J. M. C. 1); but not after the breach and danger of renewal have ceased (*Queen* v. *Walker*, 23 L. J. M. C. 123); and he may arrest persons given in charge by one who has witnessed the breach of the peace, where there is danger of immediate renewal. (*Timothy* v. *Simpson*, *supra*.) A constable is not justified in imprisoning a person in the belief that he has committed a misdemeanour. (*Griffin* v. *Colman*, 28 L. J. Ex. 134; 4 H. & N. 265.)

It is the duty of every person arresting another for an offence to take him before a justice as soon as he reasonably can; and the law gives no authority even to a justice to detain a person suspected, except for a reasonable time till he may be examined. (*Wright* v. *Court*, 4 B. & C. 596.)

A trespass committed by the defendant by authority of the Crown is an act of state and not of the defendant, and such justification may be shown under the general issue. (*Buron* v. *Denman*, 2 Ex. 167.)

As to when the plea of the general issue by statute is applicable, see *ante*, p. 596.

Before the C. L. P. Act, 1852, it was necessary to aver in the plea with particularity the grounds of suspicion, in order that the court might judge whether the suspicion was reasonable, and if the grounds of suspicion

Like pleas: Smith v. *Shirley*, 3 C. B. 142; *West* v. *Baxendale*, 9 C. B. 141; *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J. Ex. 389.

Like pleas justifying on suspicion of forgery: Currie v. *Almond*, 5 Bing. N. C. 224; *Perkins* v. *Vaughan*, 4 M. & G. 988.

Plea justifying an Arrest for a Felony committed by the Plaintiff (*a*).

That at the time of the alleged trespasses the plaintiff had feloniously stolen certain goods [of the defendant]; wherefore the defendant gave the plaintiff into custody to a policeman, duly authorized in that behalf, and caused him to be imprisoned in a police station in order that he might be dealt with according to law in respect of the said offence, which are the alleged trespasses.

Like pleas: Atkinson v. *Warne*, 3 Dowl. 483; 1 C. M. & R. 827; *Merry* v. *Green*, 7 M. & W. 623; *Warwick* v. *Foulkes*, 12 M. & W. 507.

Pleas justifying an imprisonment on the ground that the plaintiff was a dangerous lunatic: Eliot v. *Allen*, 1 C. B. 39; *Fletcher* v. *Fletcher*, 28 L. J. Q. B. 134; 1 E. & E. 420 (*b*).

Plea justifying an Assault in stopping an Affray, and to preserve the Peace.

That at the time of the alleged trespasses the plaintiff made an assault upon *J. K.* and was beating him in breach of the peace, whereupon the defendant gently laid his hands on the plaintiff in order to preserve the peace, and to prevent the plaintiff from fur-

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were insufficient, the plea was bad on demurrer. (*Mure* v. *Kaye*, 4 Taunt. 34; *Smith* v. *Shirley*, 3 C. B. 142.) The above Act does not seem to contain any provisions authorizing a more general statement of the grounds of suspicion.

The plea may be amended at the trial by striking out or correcting the averments according to the evidence. (*Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J. Ex. 389; and see *West* v. *Baxendale*, 9 C. B. 141.)

The reasonable and probable cause for suspicion is a question of law for the court to decide upon the facts found by the jury. (*Davis* v. *Russell*, 5 Bing. 354; *Panton* v. *Williams*, 2 Q. B. 169; *West* v. *Baxendale*, 9 C. B. 141; *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J. Ex. 389; and see *ante*, "*Malicious Prosecution*," p. 303.)

(*a*) This plea should not be pleaded except where the defendant cannot support a plea of justification on reasonable grounds of suspicion at the time, and can certainly prove the felony. The putting of such a plea upon the record without sufficient grounds may be taken into account by the jury in estimating the damages. (*Warwick* v. *Foulkes*, 12 M. & W. 507.)

(*b*) In this case a plea justifying the confinement of an alleged lunatic upon the ground that the defendant had obtained medical certificates that the plaintiff was of unsound mind and proper to be confined, according to the provisions of the Act for the Care and Treatment of Lunatics, 8 & 9 Vict. c. 100, s. 99, was held a bad plea. The defendant must plead and prove that the plaintiff was in fact of unsound mind and dangerous to himself or others.

ther beating the said *J. K.*, doing no more than was necessary for that purpose, which are the alleged trespasses.

Plea justifying an Imprisonment to prevent an Assault on the Defendant and to preserve the Peace.

That immediately before the alleged trespasses the plaintiff assaulted and beat the defendant in breach of the peace, and was about further to assault and beat the defendant and to break the peace, whereupon the defendant, to prevent the plaintiff from further assaulting and beating him and to preserve the peace, gave the plaintiff into custody to a policeman duly authorized in that behalf, in order that he might be dealt with according to law [and the said policeman accordingly took the plaintiff into custody, and conveyed him in custody to and imprisoned him for a reasonable time at the said police station, for the purpose of taking him before a police magistrate] in respect of the premises, which are the alleged trespasses.

Like pleas: Timothy v. *Simpson*, 1 C. M. & R. 757; *Derecourt* v. *Corbishley*, 5 E. & B. 188; *Scruton* v. *Taylor*, 8 Dowl. 110; *Coward* v. *Baddeley*, 28 L. J. Ex. 260.

Pleas justifying an arrest, in defence of the plaintiff's house and to preserve the peace: Ingle v. *Bell*, 1 M. & W. 517; *Cohen* v. *Huskisson*, 2 M. & W. 477; *Grant* v. *Moser*, 5 M. & G. 123; *Baynes* v. *Brewster*, 2 Q. B. 375; *Webster* v. *Watts*, 11 Q. B. 311; *Simmons* v. *Millingen*, 2 C. B. 524.

Plea by a railway company justifying an arrest under the authority of their Act for an offence committed against a bye-law of the company: Chilton v. *London and Croydon Ry. Co.*, 16 M. & W. 212; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314.

Plea, to an action for an assault and battery, that the defendant was summoned by the plaintiff for the same trespasses before justices, who dismissed the complaint, and delivered to the defendant a certificate of such dismissal (9 *Geo. IV. c.* 31, *ss.* 27, 28): *Skuse* v. *Davis*, 10 A. & E. 635; *Queen* v. *Robinson*, 12 A. & E. 672; *Tunnicliffe* v. *Tedd*, 5 C. B. 533; *Hancock* v. *Somes*, 28 L. J. M. C. 196; *Costar* v. *Hetherington*, 28 L. J. M. C. 198; *and see as to this defence, Bradshaw* v. *Vaughton*, 9 C. B. N. S. 103; 30 L. J. C. P. 93.

[*See also the statute* 16 *Vict. c.* 30 *(an Act for the Prevention of Assaults on Women and Children), s.* 1, *which makes a conviction under that statute a bar to all future proceedings, civil or criminal, in respect of the same assault.*]

Pleas justifying arrest and imprisonment under process: see ante, "*Process,*" *p.* 648.

Trespass: II. to Goods.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Property in the Goods (*b*).

That the said goods were not nor was any of them the plaintiff's as alleged.

Plea justifying the Removal of Goods incumbering the Defendant's Premises (*c*).

That at the time of the alleged trespass he was possessed of a messuage, and the said goods were then wrongfully in the said mes-

(*a*) The plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and no other defence than such denial is admissible under that plea. (r. 16, T. T. 1853.)

By r. 20, T. T. 1853, "in actions for taking or damaging the plaintiff's goods the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein."

In an action for trespass in taking the plaintiff's goods, the defendant, under the plea of not guilty, cannot, even in mitigation of damages, give in evidence a repayment by him after action brought of money produced by the sale of the goods. (*Rundle* v. *Little*, 6 Q. B. 174.)

(*b*) The plaintiff's property in the goods is admitted by the plea of not guilty, and, if denied, must be specifically traversed. Under the issue raised by a traverse of the plaintiff's property the plaintiff must prove a right to the immediate possession of the goods at the time of the trespass. A special or temporary right to the possession, as that of a bailee, is sufficient to maintain the action. (See further as to the right of property necessary to support this action, *ante*, p. 253, 356.)

The fact of possession is *primâ facie* evidence of the right of present property, and therefore sufficiently establishes this issue against a wrong-doer who does not show a better right or authority. (*Elliott* v. *Kemp*, 7 M. & W. 312; *Purnell* v. *Young*, 3 M. & W. 288; *Carnaby* v. *Welby*, 8 A. & E. 872.) He cannot in such case set up a *jus tertii*, unless he can also show an authority in himself to act under it. But where the plaintiff was not in actual possession in fact at the time of the trespass, and therefore relies on evidence of mere legal title, the defendant may set up a *jus tertii* to rebut the plaintiff's evidence. (*Gadsden* v. *Barrow*, 9 Ex. 514; *Leake* v. *Loveday*, 4 M. & G. 972; and see *ante*, pp. 254, 357.)

Under the same issue the defendant may show that he has a better right to the possession than the plaintiff; thus, where the plaintiff claimed under a sale, it was held that the defendant might show that the sale was fraudulent as against creditors, and that he took the goods under an execution against the owner. (*Ashby* v. *Minnett*, 8 A. & E. 121.) So, a sheriff sued for taking the goods of the plaintiff may show under this issue that the goods belong to a third party, against whom he took them in execution. (*Harrison* v. *Dixon*, 12 M. & W. 142.)

Under this issue the defendant may set up a lien. (*Richards* v. *Symons*, 8 Q. B. 90.)

(*c*) A person may remove from his land the goods of another which are there wrongfully, and is not bound to impound them. (*Rea* v. *Sheward*, 2 M. & W. 424, 426; in *Ackland* v. *Lutley*, 9 A. & E. 879, the plea justified removing the

suage, encumbering the same, and doing damage there to the defendant, whereupon the defendant took the said goods and removed them from his said messuage to a small and convenient distance, and there left the same for the plaintiff's use, doing no more than was necessary for that purpose, which is the alleged trespass.

Like pleas: Pratt v. *Pratt*, 2 Ex. 413; *Drewell* v. *Towler*, 3 B. & Ad. 735; *Aekland* v. *Lutley*, 9 A. & E. 879; *Rea* v. *Sheward*, 2 M. & W. 424; *Melling* v. *Leak*, 16 C. B. 652; *see post*, p. 677.

Plea that the defendant had mixed up his goods with those of the plaintiff so that they could not be separated, and the defendant unavoidably committed the alleged tresspasses in taking possession of his own goods: Wyatt v. *White*, 29 L. J. Ex. 193.

Plea justifying the Taking and Detaining of Cattle which had strayed on the Defendant's Close.

That at the time of the alleged trespasses he was possessed of a close, whereon the said cattle had wrongfully strayed and were trespassing and doing him damage; and the defendant not then knowing to whom the said cattle belonged, took the same in his said close and led them away to a convenient place near to the said close, and placed them therein for the purpose of safely keeping them for the owner thereof, and there kept and detained the same in safe custody until he had notice that they were the cattle of the plaintiff, which are the alleged trespasses.

A like plea: Goodwyn v. *Cheveley*, 4 H. & N. 631.

A justification of taking cattle as a distress damage feasant: ante, "*Replevin*," p. 659.

Plea to an action of trespass for driving and chasing the plaintiff's sheep, that the defendant drove them off his land on which they had strayed: Stennel v. *Hogg*, 1 Wms. Saund. 220; *Carruthers* v. *Hollis*, 8 A. & E. 113; *and see Rea* v. *Sheward*, 2 M. & W. 424, 426.

Replication that the Cattle strayed on to the Defendant's Land in consequence of Defects in the Defendant's Fences which he was bound to repair.

That before and at the times when the said cattle so strayed on the close of the defendant in the plea mentioned as therein alleged and of the said trespasses respectively, the plaintiff was possessed of a close adjoining the said close of the defendant, and the defendant and all other the tenants and occupiers of the last-mentioned close then and at all times of right ought to have maintained and repaired the fences between the last-mentioned close and the said close of the

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goods and placing them upon a common highway adjoining the plaintiff's close; and see *Carruthers* v. *Hollis*, 8 A. & E. 113.) So also if a man finds cattle trespassing on his land, he may chase them out and is not bound to distrain them damage feasant (*Tyrringham's case*, 4 Rep. 38 b; cited in *Rea* v. *Sheward*, *supra*), and it seems he may chase them into the adjoining highway. (*Carruthers* v. *Hollis*, *supra*.)

plaintiff so as to prevent cattle lawfully being and depasturing in those closes respectively from straying out of the one into the other of them through defects of the said fences; and because at the said times when the said cattle so strayed on the said close of the defendant the said fences were ruinous and in decay for want of repair thereof, the said cattle then lawfully being and depasturing in the said close of the plaintiff strayed out of the last-mentioned close into the said close of the defendant through the defects in the said fences between the said closes, whereupon the defendant of his own wrong committed the trespass in the declaration mentioned.

Like replications: Carruthers v. *Hollis*, 8 A. & E. 113; *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 29 L. J. Ex. 298.

Plea justifying the removal of the plaintiff's waggon which was encumbering the defendant's close: Holding v. *Piggott*, 7 Bing. 465.

Replication of a right by the custom of the country to come on the land with a waggon to remove a crop as outgoing tenant: Ib.

Pleas justifying the taking of goods under distress or under process: see "Distress," p. 617; *"Process," p.* 648.

Pleas justifying the removal of goods obstructing a highway: see post, "Ways," p. 688.

Trespass: III. To Land.

General Issue (a).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Property in the Land (b).

That the said land was not the plaintiff's as alleged.

(*a*) By r. 19, T. T. 1853, "In actions for trespass to land the plea of not guilty operates as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specifically." As to what amounts to a trespass to land, see *ante*, p. 359.

(*b*) The property of the plaintiff in the land must be specifically traversed. As to the title necessary to maintain trespass, see *ante*, p. 359. The owner legally entitled cannot maintain an action of trespass before entry (*Litchfield* v. *Ready*, 5 Ex. 939; *Turner* v. *Cameron's Coal Co.*, 5 Ex. 932); but an actual entry will relate back to the date of the accruing of the legal right, so as to support an action for an intervening trespass. (*Barnett* v. *Guildford*, 11 Ex. 19; *Anderson* v. *Radcliffe*, 29 L. J. Q. B. 128; and see *ante*, p. 359.) The fact of possession is *primâ facie* evidence of title, and therefore is alone sufficient to sustain the plaintiff's case against a mere wrongdoer who cannot show a better title. (*Purnell* v. *Young*, 3 M & W. 288; *Heath* v. *Milward*, 2 Bing. N. C. 98; *Matson* v. *Cook*, 4 Bing N. C. 392; *Newlands* v.

Plea that the Land was the Freehold of the Defendant (liberum tenementum) (a).

That at the time of the alleged trespass the said land was the freehold of the defendant.

Holmes, 3 Q. B. 679; *Whaley* v. *Laing*, 26 L. J. Ex. 327; 2 H. & N. 476; *Every* v. *Smith*, 26 L. J. Ex. 344.)

Under the traverse of the plaintiff's property the defendant may assert a right of possession or title to the land in himself, or in another under whose authority he acted (*Jones* v. *Chapman*, 2 Ex. 803, overruling *Whittington* v. *Boxall*, 5 Q. B. 139; *Slocombe* v. *Lyall*, 6 Ex. 119); but it is not sufficient for the defendant to prove that the plaintiff, being in possession, is not the true owner, unless he himself is, or unless he can justify his acts by the authority of a third person who is the true owner. He cannot assert the bare title of a third person, except for the purpose of proving that he acted under the authority of that title. (*Jones* v. *Chapman*, 2 Ex. 803; *Purnell* v. *Young*, 3 M. & W. 288, 296.) The plaintiff may show a better right in a third person in order to rebut a *primâ facie* title asserted by the defendant. (*Brest* v. *Lever*, 7 M. & W. 593; and see *Ryan* v. *Clark*, 14 Q. B. 65.) A person who obtains possession by turning another out of possession without any title or authority to do so, cannot assert his possession so obtained against the prior possession of the latter. (*Revett* v. *Brown*, 5 Bing. 7; *Browne* v. *Dawson*, 12 A. & E. 629; and see *ante*, "*Conversion*," p. 607.)

Under this issue it is sufficient for the defendant to show that he is the owner of a part only of the land described in the declaration, if he can also show that it is on that part of the land that all the acts complained of have been done. (*Bassett* v. *Mitchell*, 2 B. & Ad. 99; *Smith* v. *Royston*, 8 M. & W. 381.) So also it would seem to be sufficient for the defendant to show that he was tenant in common with the plaintiff, or that he was authorized by one who was tenant in common with the plaintiff, if he can also show that the alleged trespass was merely an exercise of the right of a tenant in common. One tenant in common may be guilty of a trespass against another, as by an actual ouster of him from the land. (*Murray* v. *Hall*, 7 C. B. 441; *Wilkinson* v. *Haygarth*, 12 Q. B. 837; *Stedman* v. *Smith*, 26 L. J. Q. B. 314; 8 E. & B. 1.)

Although the defence that the defendant himself is the true owner, is admissible under this issue, a freehold title in the defendant is often pleaded specially, with or without the plea traversing the property, and the plea is called a plea of *liberum tenementum*. If his title is not a freehold one, and he pleads it specially, he must deduce it from the seisin in fee, or the defendant may plead *liberum tenementum* in another person and justify under the authority of the latter. See the forms given above.

(*a*) The plea of *liberum tenementum* admits the possession of the plaintiff, but asserts a title to the freehold, and a right of possession in the defendant. (*Holmes* v. *Newlands*, 11 A. & E. 44; 3 Q. B. 679; *Roberts* v. *Tayler*, 1 C. B. 125; *Ryan* v. *Clark*, 14 Q. B. 65.) The evidence necessary to support this plea may be given under the previous plea denying the property of the plaintiff. (*Jones* v. *Chapman*, 2 Ex. 803; *Slocombe* v. *Lyall*, 6 Ex. 119; *Wilkinson* v. *Kirby*, 15 C. B. 443.)

The two pleas will be allowed to be pleaded together, as they are not necessarily founded on the same ground of answer; the plea denying the plaintiff's property disputes his possession and his title, the plea of *liberum tenementum* disputes the plaintiff's title only, and that only by asserting a title in the defendant. (*Morse* v. *Apperley*, 6 M. & W. 145; *Slocombe* v. *Lyall*, 6 Ex. 119.)

Where the declaration charges distinct acts of trespass which are not jus-

Replication, to a plea of liberum tenementum, of a demise from the defendant to the plaintiff: Brown v. *Storey*, 1 M. & G. 117; *Wilkins* v. *Boutcher*, 3 M. & G. 807; *Darlington* v. *Pritchard*, 4 M. & G. 783.

Replication, to a plea of liberum tenementum, of a demise from the defendant to a third party: Ryan v. *Clark*, 14 Q. B. 65. [*Held a good answer to the plea without showing title or authority in the plaintiff.*]

Replication, to a plea of liberum tenementum in a third party, of a demise by him and an assignment of the term to the plaintiff: Wright v. *Burroughes*, 3 C. B. 685.

Replication, to a plea of liberum tenementum, setting out a copyhold title in the plaintiff under the defendant's freehold title as lord: Barnett v. *Guildford*, 11 Ex. 19; *Thompson* v. *Hardinge*, 1 C. B. 940.

Replication by way of estoppel to pleas disputing the property of the plaintiff: ante, "*Estoppel*," *p.* 621.

Plea justifying under the Authority of the Owner (*a*).

That at the time of the alleged trespasses the said land was the freehold of *J. K.*, and the defendant as the servant and by the command of the said *J. K.* broke and entered the said close and committed the alleged trespasses.

Plea, by the Owner of a House and his Servant, justifying entering a House and removing the Plaintiff's Goods.

That at the time of the alleged trespasses the said messuage was the messuage and freehold of the defendant *E. F.*, wherefore the defendant *E. F.* in his own right, and the defendant *G. H.* as his servant and by his command broke and entered the said messuage, and because the said goods were then wrongfully in the said messuage encumbering the same and doing damage there to the defendant *E. F.*, the defendant *E. F.* in his own right and the defendant *G. H.* as his servant and by his command took the said goods and removed them to a small and convenient distance, and there left the same for the plaintiff's use, doing no more than was necessary for that purpose, which are the alleged trespasses.

Like pleas: Melling v. *Leak*, 16 C. B. 652; *Pratt* v. *Pratt*, 2 Ex. 413.

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tifiable on the mere ground that the close is not the plaintiff's (as perhaps chasing and driving off his cattle), it will not be sufficient to plead to the whole count the traverse of the plaintiff's property in the close; it may then be necessary to plead *liberum tenementum* in the defendant or in some one under whose authority he acted, and to justify expressly these acts of trespass.

As to when it is necessary to new assign to this plea, see *ante*, pp. 360, 553.

(*a*) A justification under the authority of the owner may be given in evidence under the plea denying the property of the plaintiff (*ante*, p. 675; *Jones* v. *Chapman*, 2 Ex. 803); but it is allowed to be pleaded in addition to that plea and also to the preceding plea of *liberum tenementum*. (*Morse* v. *Apperley*, 6 M. & W. 149.)

Plea stating the Defendant's Title under a Demise from the Person seised in Fee (a).

That before the alleged trespasses *J. K.*, being seised in fee of the said close, demised the same to the defendant for the term of —— years from the —— day of ——, A.D. ——, by virtue of which demise the defendant entered upon the said close and became possessed thereof for the term aforesaid, whereupon the defendant during the said term in his own right committed the alleged trespasses.

Like pleas: Wilkins v. *Boutcher*, 3 M. & G. 807; *Kavanagh* v. *Gudge*, 5 M. & G. 727; *Vivian* v. *Jenkin*, 3 A. & E. 741; *Wright* v. *Burroughes*, 3 C. B. 685; *Dyne* v. *Nutley*, 14 C. B. 122; *Mayhew* v. *Suttle*, 4 E. & B. 348.

Pleas stating other titles in the defendant: Wilkins v. *Boutcher*, 3 M. & G. 807; *Holmes* v. *Newland*, 11 A. & E. 44.

Plea of defendant's title to customary tenements of a manor: Lemprière v. *Humphrey*, 3 A. & E. 181; *Brown* v. *Storey*, 1 M. & G. 117; *Darlington* v. *Pritchard*, 4 M. & G. 783.

Plea stating title by demise from a copyhold tenant: Keyse v. *Powell*, 2 E. & B. 132.

Plea justifying a trespass under a right of fishing in a public river; Mannall v. *Fisher*, 5 C. B. N. S. 856.

Plea justifying under a public right to fish in an arm of the sea: Richardson v. *Orford*, 2 H. Bl. 182.

Replication of a prescriptive right of fishery in the same spot: Ib.

Plea justifying under a grant of liberty to hunt and shoot: Wickham v. *Hawker*, 7 M. & W. 63; *Moore* v. *Lord Plymouth*, 7 Taunt. 614; *Pickering* v. *Noyes*, 4 B. & C. 639; *Pannell* v. *Mill*, 3 C. B. 625.

Plea justifying under a grant of liberty to dig minerals: Roberts v. *Davey*, 4 B. & Ad. 664.

(a) It was formerly necessary, in pleas setting out the defendant's title as in the above case, to state in the plea a fictitious conveyance from the person seised in fee to the plaintiff, as by a charter of demise for life (without alleging livery), in order to give sufficient colour to the plaintiff's claim to support the plea as a plea in confession and avoidance. This was called giving *express colour* in the plea. (See 1 Chit. Pl. 7th ed. 556, where see also the form used.) By the C. L. P. Act, 1852, s. 64, express colour is no longer necessary, so that the plea may now be pleaded in the above form without it.

The defendant by setting out his title in full on the record enables the plaintiff to take issue on some specific step in the title, admitting what he does not intend to dispute, or by demurrer to raise the question of its sufficiency in law at once, upon an admission of the facts without a trial. Under the old system of pleading the defendant was able compulsorily to secure admissions on the record by this course, because the replication could take issue on only one point. (*Vivian* v. *Jenkin*, 3 A. & E. 741.) Under the C. L. P. Act, 1852, s. 77 (*ante*, p. 390), however, the plaintiff is enabled in his replication to take issue upon the whole plea, if he wishes to do so.

Under a reservation in a grant of a close of way leave and liberty to dig pits for coals: Dand v. *Kingscote*, 6 M. & W. 174; *Smart* v. *Morton*, 5 E. & B. 30.

Pleas justifying in respect of the ownership of mines and quarries under a prescriptive right to enter upon lands to dig through to the quarries, and raise and carry away the stone: Dand v. *Kingscote*, 6 M. & W. 174; *Rogers* v. *Taylor*, 26 L. J. Ex. 203; 1 H. & N. 706.

Plea justifying an entry on lands demised upon forfeiture of the lease for a condition broken: Hammond v. *Colls*, 3 D. & L. 164; *Roberts* v. *Tayler*, 1 C. B. 117; 7 M. & G. 659.

Plea, to an Action for a Trespass by the Defendant's Cattle on the Plaintiff's Land, that the Trespass was caused by Defects in the Plaintiff's Fences, which he was bound to repair.

That at the time of the alleged trespasses he was possessed of a close adjoining the said close of the plaintiff, and the plaintiff and all other the tenants and occupiers of the said close of the plaintiff then and at all times of right ought to have maintained and repaired the fences between the said close of the defendant and the said close of the plaintiff, so as to prevent cattle lawfully being and depasturing in those closes respectively from escaping out of the one into the other of them through defects of the said fences; and because the said fences at the time of the alleged trespasses were ruinous and in decay for want of repair thereof, the said cattle then lawfully being and depasturing in the said close of the defendant escaped out of the said close of the defendant into the said close of the plaintiff through the defects of the said fences between the said closes, and were in the said close of the plaintiff, which are the alleged trespasses.

Plea, to an action for a trespass by the defendant's cattle on the plaintiff's land, of disclaimer of title and tender of amends: see "Tender of Amends," ante, p. 666.

Plea that the defendant entered the plaintiff's close to retake his goods, which had been placed there by the plaintiff: Patrick v. *Colerick*, 3 M. & W. 483; *Wood* v. *Manley*, 11 A. & E. 34; *Anthony* v. *Haneys*, 8 Bing, 186; *and see Webb* v. *Beavan*, 6 M. & G. 1055; *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 L. J. Ex. 145; *Blades* v. *Higgs*, 10 C. B. N. S. 713; 30 L. J. C. P. 347, 349.

Plea that the defendant entered the plaintiff's close to deposit there the plaintiff's own goods, which he had wrongfully placed on the defendant's land: Rea v. *Sheward*, 2 M. & W. 424.

Plea justifying an entry on the plaintiff's land to remove an obstruction to the defendant's ancient lights: see ante, "Lights," p. 630.

Plea justifying under a right of support and of entry to maintain and repair the support to the defendant's house: see ante, "Right of Support," p. 665.

Plea justifying an entry upon the plaintiff's land to abate a nuisance of filth: Jones v. *Williams*, 11 M. & W. 176.

Other pleas to actions of trespass to land: see "*Common*," *ante, p.* 602; "*Custom*," *ante, p.* 610; "*Distress*," *ante, p.* 617; "*Process*," *ante, p.* 648; "*Tender of Amends*," *ante, p.* 665; "*Ways*," *post, p.* 683.

Warranty.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Waste.

General Issue (*b*).

"Not guilty," *ante*, p. 589.

Plea traversing the Tenancy.

That he was not tenant to the plaintiff of the said dwelling-house [*or* land] as alleged.

Plea to a Count for Waste in removing Fixtures that they were removable as Trade Fixtures.

That during the said tenancy he erected and fixed upon the said messuage and premises the fixtures in the declaration mentioned in the course of his trade of a ——, and for the purpose of carrying on the same, the said fixtures being his property and proper and necessary for the purpose of carrying on his said trade, and being of right removable by the defendant as such tenant as aforesaid; and the defendant afterwards, during the said tenancy, carefully pulled down and removed the said fixtures, and in so doing unavoidably a little damaged the said messuage and premises, doing no unnecessary damage thereto, and before the end of the said tenancy the defendant repaired the damage so done as aforesaid and restored the said messuage and premises, which are the alleged grievances.

A like plea in respect of ornamental fixtures: Avery v. *Cheslyn*, 3 A. & E. 75; *in respect of tenant's fixtures, ante,* "*Reversion*," *p.* 661.

(*a*) Where a count upon a warranty does not allege an express contract, and is treated as framed in tort, the general issue not guilty may be pleaded to it, and will have the effect of denying both the warranty and the breach. (See *ante*, p. 231 (*a*).) If the count is framed only for fraudulent misrepresentation, as in the forms pp. 289, 290, the plea of not guilty denies that the defendant fraudulently induced the sale by the false warranty or misrepresentation, and puts in issue the fact of the warranty or misrepresentation, that it was false, that the defendant did not believe it to be true, and that it induced the sale. (*Mummery* v. *Paul*, 1 C. B. 316.)

(*b*) The plea of not guilty traverses the alleged act of waste, or breach of duty. The tenancy should be traversed in terms.

WATERCOURSES.

General Issue (*a*).

"Not guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Possession.

That the plaintiff was not possessed of the said land [*or* mill] as alleged.

Plea traversing the Right to the Watercourse (*b*).

That the plaintiff was not entitled to the flow of the said stream or watercourse to and through the said land of the plaintiff [*or* for working the said mill] as alleged.

Plea traversing the plaintiff's alleged right of irrigation: Sampson v. *Hoddinott*, 1 C. B. N. S. 590.

Plea traversing the plaintiff's right to have the water fall from the eaves of his house on to the defendant's premises: Thomas v. *Thomas*, 2 C. M. & R. 34.

Plea of a prescriptive Right to use the Water for a Mill, under the 2 & 3 Will. IV. c. 71, ss. 2, 5.

That at the time of the alleged grievance he was possessed of a mill, the occupiers whereof for twenty [*or* forty, *as the case may be*] years before this suit enjoyed as of right and without interruption the right of diverting and using the water of the said river for working the said mill, as to the said mill of the defendant appertaining, and the alleged grievance was a use by the defendant of the said right.

(*a*) In actions for obstructing, polluting, diverting, etc., a watercourse, the plea of not guilty operates as a denial of the obstruction, diversion, pollution, etc. only, and not of the plaintiff's right. (r. 16, T. T. 1853; *Frankum* v. *Earl Falmouth*, 2 A. & E. 452; *Dukes* v. *Gostling*, 1 Bing. N. C. 588.) As to the different rights to watercourses, see *ante*, p. 365.

The plaintiff's right to the land through which the watercourse flows and his right to the watercourse, whether a natural or acquired right, are admitted by the plea of not guilty, and must, if denied, be traversed in terms.

A justification founded on the exercise by the defendant of any acquired right to the water beyond the natural right, such right being to that extent in derogation of the plaintiff's natural right, may be given in evidence under a traverse of the latter. (See *Ward* v. *Robins*, 15 M. & W. 237, 243.) If the act complained of was an exercise by the defendant of his mere natural right, such defence should be specially pleaded.

(*b*) By the prescription Act, 2 & 3 Will. IV. c. 71, s. 5, it is enacted that in all actions upon the case and other pleadings wherein the party may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned which shall be applicable to the case shall be admissible in evidence to sustain or rebut such allegation. (See *ante*, "*Common*," p. 603.)

Like plea: National Manure Co. v. *Donald*, 28 L. J. Ex. 185; 4 H. & N. 8.

Plea of a like prescriptive Right at Common Law (a).

That at the time of the alleged grievance he was seised in fee of a mill, and he and all those whose estate he then had therein from time immemorial enjoyed the right of diverting and using the water of the said river for working the said mill, as to the said mill of the defendant appertaining, and the alleged grievance was a use by the defendant of the said right. [*If the defendant is a tenant, state the seisin in fee and the right to use the water in the person so seised for himself and his tenants, and then state the demise to the defendant and the use by him of the right, as in the form, ante, p.* 604.]

Plea of a prescriptive Right to use the Water for Agricultural Purposes, under the 2 *&* 3 *Will. IV. c.* 71, *ss.* 2, 5.

That at the times of the alleged grievances he was possessed of land the occupiers whereof for twenty [*or* forty *as the case may be*] years before this suit enjoyed as of right and without interruption the right of diverting and using the said stream for agricultural purposes, for the better use and enjoyment of the said land, as to the said land of the defendant appertaining, and the alleged grievances were uses by the defendant of the said right.

Like pleas: Ward v. *Robins*, 15 M. & W. 237; *Northam* v. *Hurley*, 1 E. & B. 665; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590.

Plea of a prescriptive right to discharge noxious water into a stream: Wright v. *Williams*, 1 M. & W. 77; *Moore* v. *Webb*, 1 C. B. N. S. 673.

Plea of a prescriptive right to scour and amend the channel of a watercourse: Peter v. *Daniel*, 5 D. & L. 501.

Plea of a prescriptive right to throw refuse into a stream: Murgatroyd v. *Robinson*, 26 L. J. Q. B. 233; 7 E. & B. 391; *Carlyon* v. *Lovering*, 26 L. J. Ex. 251; 1 H. & N. 784.

Plea, by a Tenant, of a Right by non-existing Grant to use the Water for a Mill (b).

That at the times of the alleged grievances *J. K.* was seised in fee of a mill called —— mill; and long before the times of the alleged grievances, by a deed made between [*L. M.*] the then owner of the said land now of the plaintiff, and which said owner [*or L. M.*] was then seised thereof in fee, and [*N. O.*] the then owner of the said mill

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(*a*) It may be advisable to plead a prescriptive right at common law as well as pleas of prescription under the statute, where there is any danger of the latter pleas failing in proof by reason of an interruption in the enjoyment, or by reason of the enjoyment not being continued to the commencement of the suit. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Onley* v. *Gardiner*, 4 M. & W. 496; *Lowe* v. *Carpenter*, 6 Ex. 825; note, *ante*, p. 603; *post*, p. 684.)

(*b*) As to this plea, see *post*, "*Ways*," p. 685.

who was then seised in fee of the said mill, and whose estate therein the said *J. K.* had at the times of the alleged grievances respectively (but which deed has been lost or destroyed by accident), the said then owner of the land now of the plaintiff [*or* the said *L. M.*] granted to the said then owner of the said mill [*or* the said *N. O.*] and to his heirs and assigns the right for himself and themselves, his and their tenants and servants of diverting and using the water of the said river for the working of the said —— mill; and by virtue of the said grant the defendant, at the times of the alleged grievances respectively, as and being the tenant of the said *J. K.* of the said mill, was entitled to the right of diverting and using the water of the said river for the working of the said mill, and the alleged grievances respectively were uses by the defendant of the said right. [*If the defendant is himself seised in fee instead of being a tenant, the plea must be modified accordingly: see the form, post, p.* 685.]

WAYS.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

Plea traversing the Plaintiff's Possession.

That the plaintiff was not possessed of the said messuage [*or* land] as alleged.

Plea traversing the Right of Way.

That the plaintiff was not entitled to the said right of way as alleged.

Plea of a private Right of Way, under the 2 & 3 Will. IV. c. 71, ss. 2, 5. (C. L. P. Act. 1852, Sched. B. 46) (b).

That at the time of the alleged trespass he was possessed of land the occupiers whereof for twenty [*or* forty *as the case may be*] years before this suit enjoyed as of right and without interruption a way

(*a*) By r. 16, T. T. 1853, "In an action for obstructing a right of way, the plea of not guilty will operate as a denial of the obstruction only, and not of the plaintiff's right of way." (r. 16, T. T. 1853.) The right of way, if denied, must be specifically traversed.

Where the right of way is public, and the action only maintainable in respect of the special damage incurred by the plaintiff from the obstruction (see *ante*, p. 369), the plea of not guilty also denies that the special damage was caused by the obstruction.

(*b*) Where it is wished to repeat the plea of a right of way by prescription, under the 2 & 3 Will. IV. c. 71, s. 2, in respect of a period of forty years as well as a period of twenty years, it may be done shortly by reference to the previous plea, as follows:—"And for a —— plea, the defendant repeats what is alleged in the —— plea, substituting the period of forty years for the period of twenty years." (See *ante*, "*Commons*," p. 603.)

As to the nature of rights of way, the times of prescription, and the mode

on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant and from the said land of the defendant over the said land of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said land of the defendant, and the alleged trespass was a use by the defendant of the said way.

Like pleas: Holford v. *Hankinson*, 5 Q. B. 585; *Lowe* v. *Carpenter*, 6 Ex. 825; *Winship* v. *Hudspeth*, 10 Ex. 5.

Plea justifying Trespasses to Land and the Removal of Fences in the Exercise of a Private Right of Way, under the 2 & 3 Will. IV. c. 71, s. 5.

That at the time of the alleged trespasses he was possessed of land, the occupiers whereof for twenty [*or* forty, *as the case may be*] years before this suit enjoyed as of right and without interruption a way on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said land of the defendant; and the defendant broke and entered the said close of the plaintiff for the purpose of using the said way, and in using the same, and in so doing necessarily trod down the grass growing therein, and because the said [fences and gates] had been placed and were then wrongfully in the said way obstructing the same, the defendant necessarily broke down and destroyed the said [fences and gates] for the purpose of using the said way, doing no unnecessary damages in that behalf, which are the alleged trespasses.

Plea of a private Right of Way by Prescription at Common Law (a).

That at the time of the alleged trespass he was seised in fee of land, and he and all those whose estate he then had therein from time immemorial enjoyed a way on foot and with cattle and with carriages from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said land of the defendant, as to the said land of the defendant

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of pleading, see "*Ways*," *ante*, p. 369; and "*Common*," *ante*, p. 249, 602; the observations there made and the authorities there cited are for the most part applicable to other easements.

(*a*) A right of way may be claimed by immemorial prescription at common law, and may still be pleaded in that form. (See *ante*, "*Common*," p. 603.) Such mode of claiming the right of way is applicable where the enjoyment cannot be proved continuously and without interruption or be brought down to the commencement of the suit, as required for the periods fixed by the Prescription Act. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Lowe* v. *Carpenter*, 6 Ex. 825; *Onley* v. *Gardiner*, 4 M. & W. 496.) It may be advisable to plead a prescription at common law as well as a prescription under the statute, in cases where there is any risk of the latter failing in proof from the above causes.

appertaining, and the alleged trespass was a use by the defendant of the said way. [*If the defendant is a tenant, state the seisin in fee and the right of way in the person so seised for himself and his tenants, and then state the demise to the defendant and the use by him of the right, as in the form ante,* "*Common,*" *p.* 604.]

Pleas of rights of way for special purposes: Parker v. *Mitchell,* 11 A. & E. 788; *Monmouth Canal Co.* v. *Harford,* 1 C. M. & R. 614 (*a*).

Plea of a private Right of Way by non-existing Grant (*b*).

That at the time of the alleged trespass he was seised in fee of a close called ——; and long before the alleged trespasses

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(*a*) As to the proof of qualified rights of way, see *Cowling* v. *Higginson,* 4 M. & W. 245; *Dare* v. *Heathcote,* 25 L. J. Ex. 245; *Morant* v. *Chamberlain,* 6 H. & N. 540; 30 L. J. Ex. 299.

If the plea states the right too largely and it is capable of being distributed, the verdict may be found partly for the plaintiff and partly for the defendant (*Knight* v. *Woore,* 3 Bing. N. C. 3; *Higham* v. *Rabett,* 5 Bing. N. C. 622; and see C. L. P. Act, 1852, s. 75:) the plaintiff may show under a replication taking issue, without a new assignment, that the right of way asserted by the defendant was for certain purposes only, and that the use in respect of which the action was brought was not one to which his right extended. (*Cowling* v. *Higginson, supra.*) A count stating a right of way too largely cannot be distributed like a plea (*Brunton* v. *Hall,* 1 Q. B. 792); but the variance might be amended.

(*b*) The plea of a right of way, or of a right to any other easement, by non-existing grant may sometimes be supported by evidence which would fail to support a prescriptive right of way under the Prescription Act, as where there has been an interruption of enjoyment within the period prescribed by the statute, or where the enjoyment cannot be brought down to the commencement of the suit. (See *Parker* v. *Mitchell,* 11 A. & E. 788; *Onley* v. *Gardiner,* 4 M. & W. 496; *Lowe* v. *Carpenter,* 6 Ex. 825.) It may also sometimes be supported by evidence which would fail to support a plea of prescription at common law, by reason of the right being shown to have commenced within the period of legal memory. Hence it is frequently advisable to plead together in the same case pleas of prescription by the statute, of prescription at common law, and of a non-existing grant.

The jury are at liberty to presume the grant alleged from acts of ownership for twenty years and upwards consistent with the grant alleged in the plea. (2 Wms. Saund. 175 *a*; *Campbell* v. *Wilson,* 3 East, 294; *Livett* v. *Wilson,* 3 Bing. 115.) So that where on the trial of an issue upon this plea the judge directed the jury that if they thought that the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find a verdict for the defendant; if they thought there had been no way granted by deed, they would find for the plaintiff, the direction was held to be correct. (*Livett* v. *Wilson, supra.*)

Before the C. L. P. Act, 1852, the particularity required in pleading made it necessary that the plea of lost grant should specify the particulars of the supposed deed as to the date and the names of the parties (see *Hendy* v. *Stephenson,* 10 East, 55), and the evidence must have been consistent with the particulars stated in the plea. (*Blewett* v. *Tregonning,* 3 A. & E. 554, 583, 585.) At the present day the plea would seem to be good (in substance) without mentioning particular names; and as this form of justification is avowedly presumptive only, it may be contended that if a jury are

by a deed made between [*J. K.*] the then owner of the said close now of the plaintiff. and which said owner [*or J. K.*] was then seised thereof in fee, and [*L. M.*] the then owner of the said close called ——, who was then seised thereof in fee, and whose estate therein the defendant had at the time of the alleged trespass, (but which deed has been lost or destroyed by accident,) the said then owner of the said close now of the plaintiff [*or* the said *J. K.*] granted to the said then owner of the said close called —— [*or* the said *L. M.*], and to his heirs and assigns a way on foot and with cattle and carriages from a public highway over the said close now of the plaintiff to the said close called —— and from the said close called —— over the said close now of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said close called ——, by virtue of which said grant the defendant at the time of the alleged trespass was entitled to such way as aforesaid, and the alleged trespass was a use by the defendant of the said way. [*If the defendant is a tenant the plea must be modified accordingly, as in the form ante, p.* 682.]

Like pleas: Read v. *Brookman,* 3 T. R. 151; *Campbell* v. *Wilson,* 3 East, 294; *Livett* v. *Wilson,* 3 Bing. 115; *Blewett* v. *Tregonning,* 3 A. & E. 554.

A like plea by a tenant: see "Watercourses," ante, p. 682; *and see Bailey* v. *Stevens,* 31 L. J. C. P. 226.

Pleas of a right of way by express grant: Plant v. *James,* 5 B. & Ad. 791; *Senhouse* v. *Christian,* 1 T. R. 561; *Whalley* v. *Tompson,* 1 B. & P. 371; *Arkroyd* v. *Smith,* 10 C. B. 164; *Tatton* v. *Hammersley,* 3 Ex. 279; *Henning* v. *Burnet,* 8 Ex. 187.

Plea of a devise by will of tenements with a right of way: Pearson v. *Spencer,* 1 B. & S. 571.

Plea of a right of way under an award of enclosure commissioners: Logan v. *Burton,* 5 B. & C. 513.

Plea of a private Right of Way of Necessity.

That at the time of the alleged trespass he was seized in fee of a close called ——, next adjoining to the said close of the plaintiff; and *J. K.*, whose estate in the said close called —— the defendant then had, was at the time of the making of the conveyance hereinafter mentioned seised in fee as well of the said close of the plaintiff as of the said close called ——, and the said *J. K.* being so seised of the said closes respectively before the alleged trespass granted the said close of the plaintiff to *L. M.* and his heirs and assigns; and at and after the time of the said grant the said *J. K.* had not any way to the said close called —— otherwise than from a public highway over the said close of the plaintiff; and by reason thereof

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disposed to presume at all in favour of such a grant, they may more properly and more probably do so on a general statement that some former owner of the servient tenement granted the easement to some former owner of the dominant tenement than on a limited allegation that such a grant was made by a particular named grantor to a particular named grantee. The practice at judges' chambers, however, differs as to the form of the plea in this respect.

the said *J. K.* and all the occupiers of the said close called —— and the defendant so having the estate of the said *J. K.* therein as aforesaid, from and after the time of the said grant necessarily had and of right ought to have had a way on foot and with horses and carriages from the said public highway over the said close of the plaintiff to the said close called ——, and from the said close called —— over the said close of the plaintiff to the said public highway at all times of the year, for the necessary use and occupation of the said close called ——, the same way being the nearest and most convenient way over the said close of the plaintiff to the said close called ——, and the alleged trespass was a use by the defendant of the said way.

Like pleas: Buckby v. *Coles*, 5 Taunt. 311; *Holmes* v. *Goring*, 2 Bing. 76; *Proctor* v. *Hodgson*, 10 Ex. 824; *Pinnington* v. *Galland*, 9 Ex. 1; *Pearson* v. *Spencer*, 1 B. & S. 571.

Replication to a Plea, under the 2 & 3 Will. IV. c. 71, s. 5, of a private Right of Way, traversing the Defendant's Possession of the Land.

That the defendant was not possessed of the said land as alleged.

Replication to a like Plea traversing the Right of Way. (*C. L. P. Act*, 1852, *Sched. B.* 54 (*a*).)

That the occupiers of the said land did not for twenty [*or* forty *as the case may be*] years before this suit enjoy as of right and without interruption the alleged way.

Replication that the way was enjoyed during the period alleged by the leave and license of the plaintiff: Colchester v. *Roberts*, 4 M. & W. 769.

(*a*) The defendant's possession of the land, or the right of way appurtenant thereto, may be traversed separately as in the above replications, when it is wished to admit either. A replication taking issue under the C. L. P. Act, 1852, s. 79, may be used; it will deny both the plaintiff's possession of the land and the right of way, but not that the acts were done in exercise of the right. If this last proposition is disputed, it must be pointed out by a new assignment. (*Ante*, p. 638; *Glover* v. *Dixon*, 9 Ex. 158; *Eastern Co. Ry. Co.* v. *Dorling*, 28 L. J. C. P. 202; 5 C. B. N. S. 821.)

Under the issue raised by a traverse of the right the plaintiff may prove applications by the defendant during the prescribed period for leave to use the way, leave and license during a portion of the period being an interruption. (*Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 614; *Beasley* v. *Clarke*, 2 Bing. N. C. 705.) So unity of possession during part of the period (*Onley* v. *Gardiner*, 4 M. & W. 496; *England* v. *Wall*, 10 M. & W. 699; *Clayton* v. *Corby*, 2 Q. B. 813; *Winship* v. *Hudspeth*, 10 Ex. 5), or any matter inconsistent with the single fact of enjoyment as of right as an easement (*Bright* v. *Walker*, 1 C. M. & R. 211, 219; *Tickle* v. *Brown*, 4 A. & E. 569, 383), may be proved under this issue, and need not be specially replied. (Ib.) Leave and license during the whole period of twenty years must be specially replied, being a matter not inconsistent with the enjoyment without interruption and as of right. (*Tickle* v. *Brown*, 4 A. & E. 369, 383; *Kinloch* v. *Nevile*, 6 M. & W. 795.)

Replication to a plea of twenty years' prescription, that a term for life or years was subsisting during the twenty years (2 & 3 Will. IV. c. 76, s. 7): *Wright* v. *Williams*, 1 M. & W. 77; *Bright* v. *Walker*, 1 C. M. & R. 211; *Clayton* v. *Corby*, 2 Q. B. 813.

Replication to a plea of forty years' prescription, that a term for life or years was subsisting, and that the plaintiff is the reversioner expectant upon it (2 & 3 Will. IV. c. 76, s. 8): *Wright* v. *Williams*, 1 M. & W. 77. [*This replication only applies to easements within the second section of the statute. The preceding form applies to prescriptive rights within the first and second sections.*]

New assignment of trespasses extra viam: ante, p. 638.

Plea to new assignment extra viam, that the way was impassable, through the plaintiff's default in repairing, wherefore the defendant went extra viam as near the path as he could: see Henn's Case, Sir W. Jones, 296; *Absor* v. *French*, 2 Show. 28; *Taylor* v. *Whitehead*, 2 Doug. 744 (*a*).

Plea of a public Right of Way.

That at the time of the alleged trespass there was and of right ought to have been a common and public highway over the said land of the plaintiff for all persons to go and return on foot and with horses, cattle, and carriages, at all times of the year at their free will and pleasure, and the alleged trespass was a use by the defendant of the said highway.

Like pleas: Rouse v. *Bardin*, 1 H. Bl. 351; *Petrie* v. *Nuttall*, 11 Ex. 569; *Pipe* v. *Fulcher*, 28 L. J. Q. B. 12; 1 E. & E. 111.

Plea of a Public Highway justifying the Removal of Obstructions.

That at the time of the alleged trespass there was and of right ought to have been a common and public highway over the said land of the plaintiff for all persons to go and return, on foot and with horses, cattle, and carriages, at all times of the year, at their free will and pleasure; and the defendant, having occasion to use the said way, then entered into and upon the said land of the plaintiff and along the said highway, then using the same as he lawfully might for the cause aforesaid; and because the said [wall] had been erected, and then was wrongfully in and across the said highway, obstructing the same and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the said [wall] for the purpose of using the said highway, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Like pleas: Webber v. *Sparks*, 10 M. & W. 485; *Wood* v.

(*a*) A person entitled to the use of a private way over the land of another has no right to deviate from it in consequence of its being impassable, unless it was the duty of the owner of the land to repair the way and it has become impassable through his default in not repairing. The grantor of the way or owner of the servient tenement is not bound to repair it by the common law. (*Taylor* v. *Whitehead*, 2 Doug. 744; *Bullard* v. *Harrison*, 4 M. & S. 387.) It seems that if a public way is impassable, a person using it has a right to deviate *extra viam*. (*Ib.*; Gale on Easements, 3rd ed. by Willes, 443.)

Wedgewood, 1 C. B. 273; *Elwood* v. *Bullock*, 6 Q. B. 383; *Bracegirdle* v. *Peacock*, 8 Q. B. 174; *Dawes* v. *Hawkins*, 29 L. J. C. P. 343; 8 C. B. N. S. 848; *Morant* v. *Chamberlain*, 6 H. & N. 540; 30 L. J. Ex. 299.

Plea justifying the removal of obstructions from a public highway under the authority of the Metropolis Local Management Act: Le Neve v. *Vestry of Mile End*, 8 E. & B. 1054; 27 L. J. Q. B. 208.

A like plea of justification under the authority of a local Board of Health: Morant v. *Chamberlain*, 30 L. J. Ex. 299; 6 H. & N. 540.

Replication of a right by custom to erect booths on the highway at a fair: Elwood v. *Bullock*, 6 Q. B. 383.

Replication of a prescriptive right to place goods upon the public way: Morant v. *Chamberlain, supra.*

Plea of a public right of way along a navigable river, justifying the destruction of a weir fixed in the channel: Williams v. *Wilcox*, 8 A. & E. 314.

A like plea justifying trespasses on a landing stage of the plaintiff: Eastern Counties Ry. Co. v. *Dorling*, 28 L. J. C. P. 202; 5 C. B. N. S. 821.

Witness.

General Issue (*a*).

"Not Guilty," *ante*, p. 589.

Plea that the Testimony of the Defendant was not material.

That the appearance and testimony of the defendant were not, nor was either of them, necessary or material on behalf of the plaintiff on the trial of the said issues or any of them, as alleged.

(*a*) The plea of not guilty does not deny that the evidence of the defendant was material in the former action, or that the plaintiff had a good cause of action therein, when the latter allegation, which is involved in the former, is expressly stated. (*Needham* v. *Fraser*, 1 C. B. 815; and see *Mullett* v. *Hunt*, 1 C. & M. 752, 764.)

CHAPTER VII.

DEMURRER (*a*).

(*a*) *Demurrer.*]—Demurrer is the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side.

Before the C. L. P. Act, 1852, demurrers were of two kinds, *general* and *special*. Upon *general* demurrer no objection could be taken to mere defects of form in the pleading demurred to, for it was enacted by the statutes 27 Eliz. c. 5, and 4 Anne, c. 16, that where any demurrer should be joined the judges should give judgment according as the very right of the cause and matter in law should appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring should specially and particularly set down and express, together with his demurrer, as causes of the same. When the grounds of objection were specially and particularly set down and expressed, the demurrer was called a *special* demurrer; when not, it was called a *general* demurrer.

By the C. L. P. Act, 1852, s. 50, it is enacted that "either party may object to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form."

By s. 51, "no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer."

By s. 52, "if any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit."

Since these enactments objections which could formerly be taken by way of special demurrer, as objections on the ground of argumentativeness, want of particularity, repugnancy, duplicity, etc., when not amounting also to matter of substance, are no longer grounds of demurrer, and are to be remedied, if necessary, by the summary method provided by the s. 52 and by the general summary jurisdiction of the court. Duplicity in pleas or subsequent pleadings, pleaded without leave of the court or a judge, may sometimes amount to a violation of the s. 81 of the Act, and entitle the other party to sign judgment. A departure in pleading is matter of substance, and ground of general demurrer. (*Bartlett* v. *Wells*, 31 L. J. Q. B. 57; *Brine* v. *Great Western Ry. Co.*, 31 L. J. Q. B. 101; *Thames Ironworks and Shipbuilding Co.* v. *Royal Mail Steam Packet Co.*, 31 L. J. C. P. 169.)

There is now therefore but one kind of demurrer, and this is admissible only when the pleading of the opposite party is bad in substance.

By the C. L. P. Act, 1852, s. 89, it is provided that "the form of a demurrer shall be as follows or to the like effect:

> "The defendant by his attorney [*or* in person, etc. *or* plaintiff] says that the declaration [*or* plea, etc.] is bad in substance."

And in the margin thereof some substantial matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; and the form of a joinder in demurrer shall be as follows, or to the like effect:—

"The plaintiff [*or* defendant] says that the declaration [*or* plea, etc.] is good in substance."

A demurrer is within the s. 54 of the C. L. P. Act, 1852, which requires that "every pleading shall be entitled of the proper court and of the day of the month and the year when the same was pleaded, and shall bear no other time or date." (See *ante*, p. 373.)

The effect of a demurrer is, that the party demurring thereby confesses on the record that for the purposes of the demurrer all the matters of fact pleaded are to be taken to be true (1 Wms. Saund. 337, n. 3); but denies that they are sufficient in their legal effect to constitute the right or defence which is maintained by the other side. An issue in law is thus raised which is decided by the court after argument.

The court upon the argument of a demurrer (except in the case of a demurrer to a plea in abatement) will look over the whole record, and consider as well the previous pleadings as the particular pleading demurred to, and give judgment for the party who on the whole appears to be entitled to it. (Steph. Pl. 6th ed. 133.) But a plaintiff is not entitled to recover in respect of a cause of action which is not stated in his declaration and is disclosed only in the defendant's plea. (*Marsh* v. *Bulteel*, 5 B. & Ald. 507.)

When a pleading is clearly bad in substance, it is generally advisable to demur to it, as the judgment upon the demurrer (except a judgment for the plaintiff on a demurrer to a plea in abatement) will be final, and determine the cause, or the part of it to which the demurrer relates, in the simplest and cheapest manner; and the demurrer will prevent the possibility of the defect being aided by pleading over or by verdict.

But although a party may elect not to demur to a defective pleading, he may be able to object to it at a later stage, either upon a subsequent demurrer, or by motion in arrest of judgment, or for judgment *non obstante veredicto*, or by error. There is, however, a disadvantage in taking the objection by a motion in arrest of judgment, or for judgment *non obstante veredicto*, by reason of the enactments of the C. L. P. Act, 1852, with respect to such motions. For by that statute, s. 143, upon any such motion the party whose pleading is alleged to be defective may, by leave of the court, suggest any omitted facts or other matter which, if true, would remedy the defect; and such suggestion may be pleaded to, and the issues thereon tried as in an ordinary action. By s. 144, the judgment is made to follow the result of the suggestion, as if it had been originally stated in the pleading, and the costs of the issues are given to the successful party. And by s. 145, the party against whom judgment is given is entitled to the costs of any issues in fact arising out of the defective pleading on which he has succeeded. These provisions, it will be observed, do not extend to cases where error is brought.

It may frequently happen that a party who is in a position to demur to the preceding pleading may be able to strengthen his own case by adding some fact which does not yet appear on the record; in such case the most advisable course is to abstain from demurring, and to plead the additional fact or facts as if by way of answer to the preceding pleading, and then the other party will be compelled to demur (assuming the new facts to be true), and will thereby admit the new facts; and the party pleading will thus gain the advantage of objecting upon the argument to the original defective pleading with the benefit of the added facts. (See an example of such pleadings in *Williams* v. *Great Western Ry. Co.*, 10 Ex. 15.)

Where a pleading states a deed or an agreement or other written document according to its supposed legal effect, and the opposite party admits

Demurrer to a Declaration. (*C. L. P. Act*, 1852, *s.* 89.)

In the Queen's Bench [*or* Common Pleas *or* Exchequer of Pleas].

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney [*or* in person, *or if there is a plea preceding the demurrer* the defendant] says that the declaration is bad in substance.

A matter of law intended to be argued is [*state a substantial ground of demurrer* (*a*).]

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the instrument in fact but disputes the construction put upon it, it is often convenient for the latter to set out the writing *verbatim* in his pleading in order that the party relying on the document may be compelled to demur, and so raise the question as to the legal construction upon the demurrer. (See C. L. P. Act, 1852, s. 56; *ante*, p. 376; *Sim* v. *Edmands*, 15 C. B. 240; and see *ante*, p. 402.)

Pleading and demurring to the same pleading.]—At common law a party had the alternative either to plead or to demur to the pleading of his opponent, but was not at liberty both to plead and demur to the same pleading. (*Bayley* v. *Baker*, 1 Dowl. N. S. 891.) It was thought expedient to allow this liberty subject to the leave of the court or a judge. Accordingly it was enacted by the C. L. P. Act, 1862, s. 80, that "either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney, if required by the court or a judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law; and that it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of."

By r. 62, H. T. 1853, "Where issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party."

It is discretionary in the court or a judge to allow a party to plead and demur together, although an affidavit is made as required by the above section. (*Thompson* v. *Knowles*, 24 L. J. Ex. 43.) Where the defendant obtained leave to traverse and demur to the surrejoinder, and judgment was given against him on the demurrer on the ground that his plea was bad, the court refused to rescind the order as to the traverse, because the defendant was entitled to a writ of error on the plea. (*Sheehy* v. *The Professional Life Ass. Co.*, 13 C. B. 801.) After judgment on the demurrer the court has no power to postpone the trial of the issue in fact until the issue in law has been finally disposed of in a court of error. (*Lumley* v. *Gye*, 2 E. & B. 216.) The affidavit mentioned in s. 80 (*supra*) is seldom required.

If issues in fact are raised, it is not advisable for a plaintiff to demur, where he can with safety avoid it, as he would thereby delay the final judgment and the recovery of his demand. Where there is a demurrer, either party may set it down for argument; so that although the plaintiff only (unless the court or a judge interferes, or the plaintiff is in default) has the control of the issues in fact, the defendant may be able, where it is his interest to do so, to get the demurrer tried first.

(*a*) *Marginal note.*]—The statement in the margin required by the C. L.

Demurrer to Part of a Declaration (b).

In the ——.

The —— day of ——, A.D. ——.

F. ats. *B.* } The defendant, by *G. H.* his attorney, [*or* in person, *or if there is a plea preceding the demurrer* the defendant] as to the —— count of the declaration, [*or* the breach first *or* secondly, *or as the case may be*, above assigned, *or* as to so much of the —— count as alleges that *or* as charges the defendant with *or* as relates to, *etc.*,] says that it is bad in substance.

A matter of law intended to be argued is [*state a substantial ground of demurrer*].

P. Act, 1852, s. 89, of the substantial matter of law intended to be argued, must be something more particular than a mere repetition of the demurrer; thus under the former rule of court to the same effect a marginal statement "that the matters disclosed by the plea contained no justification" was held insufficient. (*Ross* v. *Robeson*, 3 Dowl. 779.) The statement of one point is enough. (Ib.) Where several demurrers were pleaded to several pleas on the same grounds, it was held sufficient to make the statement in full in the marginal note to the first demurrer, and to refer to it in the others. (*Braham* v. *Watkins*, 16 M. & W. 77.) A statement of the matter to be argued will not be deemed frivolous if the point raised by it be arguable, because the effect of setting aside a demurrer is to deprive the party of his writ of error: but if it be obviously frivolous, or is pleaded in direct opposition to some decided case, or amount to saying nothing, the demurrer would be set aside and judgment allowed as for want of a plea. (*Papineau* v. *King*, 2 Dowl. N. S. 228; *Tucker* v. *Barnesley*, 16 M. & W. 56; and see *Hall* v. *Conder*, 26 L. J. C. P. 251.) The omission or insufficiency of the marginal statement is an irregularity, and is ground for setting aside the demurrer under the above section; but it is no objection to the demurrer being argued. (*Lacey* v. *Umbers*, 3 Dowl. 732; and see as to the application to set aside the demurrer, 2 Chit. Pr. 11th ed. 914.)

The marginal note of a demurrer to an equitable plea may be to the following effect:—"That the plea does not show circumstances under which a court of equity would grant to the defendant a perpetual and unconditional injunction against the plaintiff's claim."

The marginal statement of the ground of demurrer is altogether distinct from the points which are to be delivered to the judges with the demurrer books. The object of the latter is to inform the court of the points of law intended to be argued; whereas the marginal note is only required as a voucher for the sufficiency or *bona fides* of the demurrer. The points for argument are not restricted by the marginal statement.

(*b*) The demurrer should be confined to that part of the pleading which is insufficient. It was formerly the practice of the courts if a demurrer was too large, that is, if it covered matters which were sufficient in law, to give judgment for the other party on the whole demurrer. (*Hinde* v. *Gray*, 1 M. & G. 201, *note; Parrett Nav. Co.* v. *Stower*, 6 M. & W. 564.) But it has since been recognized that the judgment should be in his favour only for so much of the pleading as is sufficient and against him for the residue. (*Briscoe* v. *Hill*, 10 M. & W. 735; per Parke, B., *Dawson* v. *Wrench*, 3 Ex. 359, 365.) Thus, in the case of a general demurrer to two counts, one of which is good and the other bad, the plaintiff has judgment on the good count and not on the other. (*Briscoe* v. *Hill*, *supra*.) So where a declaration assigned two breaches, and one of them only was well assigned, but the demurrer went to the whole declaration, the judgment for the plaintiff was

Demurrer to a Plea or subsequent Pleading.

In the ——.

The —— day of ——, A.D. ——.

B. / *F.* v. *F.* / *B.* *or* ats. The plaintiff [*or* defendant] says that the plea [*or* —— plea *or* the replication *or* the replication to the —— plea *or* the rejoinder, *or as the case may be, particularizing the pleading to which the demurrer is addressed*] is bad in substance.

A matter of law intended to be argued is [*state a substantial ground of demurrer*].

Demurrer to Part of a Plea.

In the ——.

The —— day of ——, A.D. ——.

B. v. *F.* The plaintiff, as to so much of the plea [*or* —— plea] as relates to [*or* as alleges that, *here state the part demurred to,*] says that the same is bad in substance.

A matter of law intended to be argued is [*state a substantial ground of demurrer*].

A like form: Christopherson v. *Bare,* 11 Q. B. 473.

Joinder in Demurrer. (*C. L. P. Act,* 1852, *s.* 89 (*a*).)

In the ——.

The —— day of ——, A.D. ——.

B. / *F.* v. *F.* / *B.* *or* ats. The plaintiff [*or* defendant] says that the declaration [*or* —— count *or* plea *or* —— plea *or as the case may be*] is good in substance.

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confined to that breach which was well assigned. (*Slade* v. *Hawley,* 13 M. & W. 757.)

But where a plea is pleaded to several counts or breaches, and is bad as to some of them, upon demurrer it is bad altogether, and it cannot be construed distributively under the C. L. P. Act, 1852, s. 75, *ante,* p. 377, so as to be good in part. (Steph. Pl. 6th ed. 324; *Parratt* v. *Goddard,* 1 Dowl. N. S. 874; *Chappell* v. *Davidson,* 18 C. B. 194; 25 L. J. C. P. 225; but see *Blagrave* v. *Bristol Waterworks Co.,* 1 H. & N. 369.)

(*a*) By the r. 14, H. T. 1853, "The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately or indorsed on the demurrer, otherwise judgment."

The plaintiff cannot himself add the joinder in demurrer, as he might a joinder in issue. (*Mullins* v. *Cox,* 7 Dowl. 660.) But he sometimes obtains the right of doing so by its being imposed on the defendant as a condition of allowing the latter to plead a questionable plea together with others, or for some like cause, where the plaintiff might otherwise be delayed.

As to the making up and delivery of the demurrer books and points for argument, and further as to the proceedings upon demurrer, see r. 14–17, H. T. 1853; and see 2 Chit. Pr. 11th ed. 912.

In making up the demurrer book care should be taken to insert the date of the writ of summons, as in an issue in fact (see *ante,* p. 395), the date being often material upon the argument.

APPENDIX

OF

RECENT STATUTES AND GENERAL RULES RELATING TO PLEADING (*a*).

THE COMMON LAW PROCEDURE ACT, 1852.

(15 & 16 VICT. CAP. 76.)

An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law at Westminster, and in the Superior Courts of the Counties Palatine of Lancaster and Durham.

[30th June, 1852.]

WHEREAS the process, practice, and mode of pleading in the superior courts of common law at Westminster may be rendered more simple and speedy: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

Commencement of Act.

1. The provisions of this Act shall come into operation on the twenty-fourth day of October in the year of our Lord one thousand eight hundred and fifty-two.

Writs for Commencement of Actions.

And with respect to the writs for the commencement of personal actions in the said courts against defendants, whether in or out of the jurisdiction of the courts, be it enacted as follows:

Personal actions, when defendant resides within the jurisdiction, to be commenced by writ of summons in Form, No. 1, of Schedule (A.).

2. All personal actions brought in her Majesty's superior courts of common law, where the defendant is residing or supposed to reside within the jurisdiction of the said courts, shall be commenced by writ of summons in the form contained in the Schedule (A.) to this Act annexed, marked No. 1, and in every such writ and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by any one of the officers of the said courts respectively by whom like process hath been heretofore issued from such court, or by such other officer as the court shall direct.

(*a*) References are given throughout the Appendix to the passages in the body of the work in which the several enactments and rules are commented on or cited.

No form or cause of action to be mentioned in writ.

3. It shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons, issued under the authority of this Act. (See *ante*, pp. 7, 29, 49, 77, 239.)

Writ to state names of all defendants, and for only one action.

4. Every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one. (See *ante*, p. 5.)

5–24. [Sections 5 to 24 inclusive relate to the form, renewal, and service of writs of summons.]

Special indorsement of the particulars of debts or liquidated demands may be made on the writ.

25. In all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim, in the form contained in the schedule (A.) to this Act annexed, marked No. 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the court or a judge. (See *ante*, pp. 46, 48, 138.)

Special indorsement to stand for particulars of demand.

Appearance, and Proceedings in Default of Appearance.

And with respect to the appearance of the defendant, and proceedings of the plaintiff in default of appearance, be it enacted as follows:

26. [Appearance according to provisions of Acts of 12 Geo. I. c. 29, and 2 Will. IV. c. 39, abolished.]

Final judgment upon writ specially indorsed in default of appearance.

27. In case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the Schedule (A.) to this Act annexed, marked No. 5, (on which judgment no proceeding in error shall lie,) for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, (to be fixed by the masters of the said superior courts, or any three of them, subject to the approval of the judges thereof, or any eight of them, of whom the Lord Chief Justices and the Lord Chief Baron shall be three,) unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before: provided always, that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application, supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits. (See *ante*, p. 1.)

Judgment for non-ap-

28. In case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall

and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, to file a declaration indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead, so indorsed as aforesaid; and in the event of no plea being delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any, and the sum fixed by the masters for costs, as hereinbefore mentioned, unless the plaintiff claim more, in which case the costs shall be taxed in the ordinary way: provided always, that in such case the plaintiff shall not be entitled to more costs than if he had made such special indorsement, and signed judgment upon non-appearance. (See *ante*, p. 1.)

Appearance where the writ is not indorsed in the special form.

29. The defendant may appear at any time before judgment, and if he appear after the time specified either in the writ of summons, or in any rule or order to proceed as if personal service had been effected, he shall, after notice of such appearance to the plaintiff or his attorney, as the case may be, be in the same position as to pleadings and other proceedings in the action as if he had appeared in time: provided always, that a defendant appearing after the time appointed by the writ shall not be entitled to any further time for pleading or any other proceeding than if he had appeared within such appointed time. (See *ante*, p. 373.)

Appearance to be entered at any time before judgment.

30. [Appearance by the defendant in person to give an address at which proceedings may be served.]

31. [Mode of appearance to writ of summons.]

32. [Proceedings mentioned in writ or notice may be had and taken.]

33. In any action brought against two or more defendants, where the writ of summons is indorsed in the special form hereinbefore provided, if one or more of such defendants only shall appear, and another or others of them shall not appear, it shall and may be lawful for the plaintiff to sign judgment against such defendant or defendants only as shall not have appeared, and, before declaration against the other defendant or defendants, to issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants who shall have appeared; or the plaintiff may, before issuing such execution, declare against such defendant or defendants as shall have appeared, stating, by way of suggestion, the judgment obtained against the other defendant or defendants who shall not have appeared, in which case the judgment so obtained against the defendant or defendants who shall not have appeared shall operate and take effect in like manner as a judgment by default obtained before the commencement of this Act against one or more of the several defendants in an action of debt before the commencement of this Act. (See *ante*, p. 11.)

Proceedings where only some of the defendants appear to a writ specially indorsed.

Joinder of Parties.

And with respect to the joinder of parties to actions, be it enacted as follows:

Non-joinder and misjoinder of

34. It shall and may be lawful for the court or a judge, at any time before the trial of any cause, to order that any person or persons, not joined as plaintiff or plaintiffs in such cause, shall be

plaintiffs may be amended before trial.

so joined; or that any person or persons originally joined as plaintiff or plaintiffs, shall be struck out from such cause; if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing, under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause. (See *ante*, pp. 404, 405, 599.)

Non-joinder and mis-joinder of plaintiffs may be amended at the trial, as in cases of amendments of variances under 3 & 4 Will. IV. c. 42.

35. In case it shall appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, such misjoinder or non-joinder may be amended as a variance, at the trial, by any court of record holding plea in civil actions, and by any judge sitting at nisi prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances under an Act of Parliament passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the further Amendment of the Law, and the better Advancement of Justice," if it shall appear to such court, or judge, or other presiding officer, that such misjoinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent, either in person or by writing under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action. (See *ante*, pp. 405, 599.)

Upon notice or plea of non-joinder of plaintiffs, proceedings may be amended.

36. In case such notice be given, or any plea in abatement of non-joinder of a person or persons as co-plaintiff or co-plaintiffs, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, and to proceed in the action without any further appearance, on payment of the costs of, and occasioned by, such amendment only, and in such case the defen-

dant shall be at liberty to plead *de novo*. (See *ante*, pp. 405, 411, 599.)

Misjoinder of defendants may be amended before or at trial.

37. It shall and may be lawful for the court or a judge in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment: and the amendment shall be made upon such terms as the court or judge, by whom such amendment is made, shall think proper; and in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court or judge, or other presiding officer, by whom such amendment is made, shall think proper. (See *ante*, p. 405.)

Upon plea in abatement for non-joinder of defendants, proceedings may be amended.

38. In any action on contract where the non-joinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action. (See *ante*, pp. 406, 411.)

Provision in the case of subsequent proceedings against the persons named in a plea in abatement for non-joinder of defendants.

39. In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement. (See *ante*, p. 406.)

Joinder of claims by husband and wife with claims in right of husband.

40. In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit: provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate. (See *ante*, pp. 7, 17, 294, 296, 355, 392.)

Joinder of Causes of Action.

And with respect to joinder of causes of action, be it enacted as follows:

Different causes of action may be joined, but separate trials may be ordered.

41. Causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit: but this shall not extend to replevin or ejectment: and where two or more of the causes of action so joined are local, and arise in different countries, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had. (See *ante*, pp. 2, 7, 29, 239, 338.)

Questions by Consent without Pleading.

And for the determination of questions raised by consent of the parties without pleading, be it enacted as follows:

42–48. [Sections 42 to 48 inclusive relate to questions of fact and of law raised without pleading.]

Pleadings in general.

And with respect to the language and form of pleadings in general, be it enacted as follows:

Fictitious and needless averments not to be made.

49. All statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods or their value; the statement of acts of trespass having been committed with force and arms, and against the peace of our lady the Queen; the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements; and all statements of a like kind, shall be omitted. (See *ante*, pp. 253, 255, 271, 354, 376.)

Judgment upon demurrer to be given according to the very right of the cause.

50. Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form. (See *ante*, p. 690.)

Objections by way of special demurrer taken away.

51. No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer. (See *ante*, pp. 377, 450, 466, 690.)

Pleadings framed to embarrass may be struck out or amended.

52. If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit. (See *ante*, pp. 362, 377, 397, 690.)

Four days' notice substituted for rule to declare, reply, or rejoin.

53. Rules to declare, or declare peremptorily, and rules to reply, and plead subsequent pleadings, shall not be necessary, and instead thereof a notice shall be substituted requiring the opposite party to declare, reply, rejoin, or as the case may be, within four days, otherwise judgment, such notice to be delivered separately or indorsed on any pleading to which the opposite party is required to reply, rejoin, or as the case may be. (See *ante*, p. 390.)

Pleadings to be dated and

54. Every declaration and other pleading shall be entitled of the proper court, and of the day of the month and the year when

the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment roll under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge. (See *ante*, pp. 1, 373, 390, 691.)

Entered as of time of pleading, unless order to the contrary.

55. It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made it shall not entitle the opposite party to crave over of or set out upon oyer such deed or other document. (See *ante*, p. 377.)

Profert and over abolished.

56. A party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out. (See *ante*, pp. 377, 402, 467, 692.)

Document may be set forth, and be considered a part of the pleading in which it is set forth.

57. It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest. (See *ante*, pp. 124, 375, 377, 467, 483.)

Performance of conditions precedent may be averred generally.

Declaration.

And with regard to the time and manner of declaring, and to particulars of demand, be it enacted as follows:

Plaintiff to declare within a year.

58. A plaintiff shall be deemed out of court, unless he declare within one year after the writ of summons is returnable.

Forms of commencement, etc., of declaration.

59. Every declaration shall commence as follows, or to the like effect:

[Venue.] "A. B. by E. F., his attorney," [*or* "in person," *as the case may be*,] "sues C. D. for" [*here state the cause of action*]; and shall conclude as follows, or to the like effect:

"And the plaintiff claims £ ," [*or if the action is brought to recover specific goods*, "the plaintiff claims a return of the said goods or their value, and £ for their detention."]

(See *ante*, pp. 1, 8.)

Commencement of declaration after plea of non-joinder.

60. In all cases in which, after a plea in abatement of the non-joinder of another person as defendant, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, or shall amend by adding the omitted defendant or defendants, the commencement of the declaration shall be in the following form, or to the like effect:

[Venue.] "A. B. by E. F., his attorney," [*or* "in his own proper person," *etc.*,] "sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. for," etc.

(See *ante*, p. 11.)

Declaration for libel or slander.

61. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient. (See *ante*, pp. 265, 592, 611, 614.)

Pleas and subsequent Pleadings.

And as to pleas and subsequent pleadings, be it enacted as follows:

Rules to plead and demand of plea abolished.

62. No rule to plead or demand of plea shall be necessary, and the notice to plead indorsed on the declaration or delivered separately shall be sufficient. (See *ante*, p. 373.)

Time for pleading, where defendant is within jurisdiction, to be eight days.

63. In cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, shall be eight days; and a notice requiring the defendant to plead thereto in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed upon the declaration, or delivered separately. (See *ante*, p. 373.)

Express colour abolished.

64. Express colour shall no longer be necessary in any pleading. (See *ante*, pp. 377, 678.)

Special traverses abolished.

65. Special traverses shall not be necessary in any pleading. (See *ante*, p. 377.)

Formal commencement and prayer of judgment unnecessary.

66. In a plea or subsequent pleading it shall not be necessary to use any allegation of *actionem non* or *actionem ulterius non*, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading, to use any allegation of *præcludi non*, or to the like effect, or any prayer of judgment. (See *ante*, p. 387.)

Commencement of plea.

67. No formal defence shall be required in a plea, or avowry, or cognizance, and it shall commence as follows, or to the like effect:

"The defendant by his attorney," [*or* "in person," *or as the case may be*,] "says that" [*here state the first defence*];

and it shall not be necessary to state in a second or other plea, or avowry, or cognizance, that it is pleaded by leave of the court or a judge, or according to the form of the statute, or to that effect; but every such plea, avowry, or cognizance shall be written in a separate paragraph, and numbered, and shall commence as follows, or to the like effect:

"And for a second [*etc.*] plea the defendant says, that" [*here state second etc. defence*];

or if pleaded to part only, then as follows, or to the like effect:

"And for a second [*etc.*] plea to" [*stating to what it is pleaded*], "the defendant says that," *etc.*

and no formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading. (See *ante*, pp. 373, 383, 387, 654.)

Plea of matter subsequent to action.

68. Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action. (See *ante*, pp. 387, 388.)

Plea *puis darrein continuance*, when and how to be pleaded.

69. In cases in which a plea *puis darrein continuance* has heretofore been pleadable in banc or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; and such plea may, when necessary, be pleaded at nisi prius, between the tenth of August and twenty-fourth of October; but no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order. (See *ante*, pp. 374, 387, 388.)

Payment into court in certain actions.

70. It shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or de-

bauching of the plaintiff's daughter or servant), and, by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends: provided that nothing herein contained shall be taken to affect the provisions of a certain Act of Parliament passed in the session of Parliament holden in the sixth and seventh years of the reign of her present Majesty, intituled "An Act to amend the Law respecting defamatory Words and Libel." (See *ante*, pp. 561, 615, 645.)

Payment into court, how pleaded.

71. When money is paid into court, such payment shall be pleaded in all cases, as near as may be, in the following form, *mutatis mutandis*:

"The defendant by his attorney" [*or* "in person," *etc.*] [*if pleaded to part say*, "as to £ parcel of the money claimed"], "brings into court the sum of £ and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

(See *ante*, pp. 561, 645, 647.)

No order to pay money into court.

72. No rule or judge's order to pay money into court shall be necessary, except in the case of one or more of several defendants, but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff or to his attorney, upon a written authority from the plaintiff, on demand. (See *ante*, pp. 562, 645.)

Proceeding by plaintiff after payment into court.

73. The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit. (See *ante*, pp. 562, 564, 565, 645, 647.)

Pleas to actions partaking both of breach of contract and wrong.

74. Whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts: Any plea which shall be good in substance, shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract, or for a wrong. (See *ante*, pp. 232, 238, 397, 469, 589.)

Payment, set-off, and other pleadings which can be construed distributively shall be so construed.

75. Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. (See *ante*, pp. 377, 559, 576, 685, 693.)

Traverse of the declaration.

76. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse. (See *ante*, pp. 375, 397.)

Traverse of

77. A plaintiff shall be at liberty to traverse the whole of any

plea or subsequent pleading of defendant.

plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations. (See *ante*, pp. 390, 652, 657, 678.)

Traverse of replication or subsequent pleading of the plaintiff.

78. A defendant shall be at liberty in like manner to deny the whole or part of a replication or subsequent pleading of the plaintiff. (See *ante*, pp. 390, 657.)

Joinder of issue.

79. Either party may plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect:

The plaintiff joins issue upon the defendant's first [*etc., specifying what or what part*] plea:

The defendant joins issue upon the plaintiff's replication to the first [*etc., specifying what*] plea:

and such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant. (See *ante*, pp. 390, 391, 605, 657, 687.)

As to pleading and demurring together.

80. Either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law, and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of. (See *ante*, pp. 383, 390, 692.)

Several matters may be pleaded at any stage of the pleadings.

81. The plaintiff in any action may, by leave of the court or a judge, plead in answer to the plea, or the subsequent pleading of the defendant, as many several matters as he shall think necessary to sustain his action; and the defendant in any action may, by leave of the court or a judge, plead in answer to the declaration, or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact; provided that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues. (See *ante*, pp. 379, 382, 690.)

Judge's order to plead several matters sufficient.

82. No rule of court for leave to plead several matters shall be necessary where a judge's order has been made for the same purpose.

Objections to pleadings to be heard on summons to plead several matters.

83. All objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters. (See *ante*, pp. 379, 387.)

Certain pleas may be

84. The following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or

judge; that is to say, a plea denying any contract or debt alleged in the declaration; a plea of tender as to part; a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent Act, plene administravit, plene administravit præter, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property an injury to which is complained of is the plaintiff's, leave and license, son assault demesne, and any other pleas which the judges of the said superior courts, or any eight or more of them, of whom the chief judges of the said courts shall be three, shall by any rule or order, to be from time to time by them made in term or vacation, order or direct. (See *ante*, pp. 379, 616.)

Pleaded together without leave.

85. The signature of counsel shall not be required to any pleading.

Signature of counsel.

86. Except in the cases herein specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party shall be at liberty to sign judgment; provided that such judgment may be set aside by the court or a judge, upon an affidavit of merits, and such terms as to costs and otherwise as they or he may think fit. (See *ante*, p. 379.)

For pleading several matters without leave, judgment may be signed.

87. One new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both. (See *ante*, pp. 47, 553, 555.)

One new assignment only allowed in respect of the same cause of action.

88. No plea, which has already been pleaded to the declaration, shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits. (See *ante*, p. 555.)

Pleas not to be repeated.

89. The form of a demurrer, except in the cases herein specifically provided for, shall be as follows, or to the like effect:

Form of demurrer and joinder in demurrer.

The defendant, by his attorney [*or* "in person," etc., *or* "plaintiff"] says, that the declaration [*or* "plea," etc.] is bad in substance;

and in the margin thereof some substantial matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; and the form of a joinder in demurrer shall be as follows, or to the like effect:

The plaintiff [*or* "defendant"] says that the declaration [*or* "plea," etc.] is good in substance.

(See *ante*, p. 690, 692, 693, 694.)

90. Where an amendment of any pleading is allowed, no new notice to plead thereto shall be necessary; but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the court or a judge; and in case the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the court or a judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading. (See *ante*, p. 374.)

Time for pleading after amendment.

Examples of Pleading.

And whereas it is desirable that examples should be given of the statements of causes of action, and of forms of pleading, be it enacted as follows:

Forms in schedule may be adopted.

91. The forms contained in the Schedule (B.) to this Act annexed shall be sufficient, and those and the like forms may be used, with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity. (See *ante*, p. 30.)

Judgment by Default, and ascertaining Amount to be recovered.

And with respect to judgment by default, and the mode of ascertaining the amount to be recovered thereupon, be it enacted as follows:

Rule to compute abolished.

92. No rule to compute shall be necessary or used; but nothing in this Act contained shall invalidate any proceedings already taken or to be taken by reason of any rule to compute, made or applied for before the commencement of this Act.

Judgment by default for liquidated demands final.

93. In actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final.

Inquiry of damages may be directed to take place before the master.

94. In actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the court or a judge may direct that the amount, for which final judgment is to be signed, shall be ascertained by one of the masters of the said court; and the attendance of witnesses and the production of documents before such master may be compelled by subpœna, in the same manner as before a jury upon a writ of inquiry; and it shall be lawful for such master to adjourn the inquiry from time to time, as occasion may require; and the master shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order, with such indorsement, to the plaintiff; and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry. (See *ante*, p. 29.)

Judgment for money demands without distinction between debt and damages

95. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

Saving as to certain provisions of 8 & 9 Will. III. c. 11.

96. Nothing in this Act contained shall in any way affect the provisions of a certain Act of Parliament passed in the session of Parliament holden in the eighth and ninth years of the reign of his Majesty King William the Third, intituled "An Act for the better preventing frivolous and vexatious Suits," as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches. (See *ante*, p. 97.)

Notice of Trial, Inquiry, and Countermand.

And with respect to notice of trial and inquiry, and countermand thereof, be it enacted as follows:

97–99. [Sections 97 to 99 inclusive relate to notice of trial and countermand.]

Judgment for not proceeding to Trial.

And with respect to judgment for default in not proceeding to trial, be it enacted as follows:

100, 101. [Sections 100 and 101 relate to judgment for not proceeding to trial.]

Nisi Prius Record.

And with respect to the nisi prius record, be it enacted as follows:

102, 103. [Sections 102 and 103 relate to the nisi prius record.]

Jury and Jury Process.

And with respect to juries and jury process, be it enacted as follows:

104–116. [Sections 104 to 116 inclusive relate to the jury and the jury process.]

Admission of Documents.

And with respect to the admission of documents, be it enacted as follows:

117–119. [Sections 117 to 119 inclusive relate to the admission of documents.]

Execution.

And with respect to execution, be it enacted as follows:

120–127. [Sections 120–127 inclusive relate to execution.]

Proceedings to revive.

And with respect to proceedings for the revival of judgments and other proceedings by and against persons not parties to the record, be it enacted as follows:

Execution in six years without revival.

128. During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment.

Judgment to be revived by writ or with leave of court or judge, by suggestion.

129. In cases where it shall become necessary to revive a judgment by reason either of lapse of time, or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the form hereinafter mentioned, or apply to the court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment and to issue execution thereupon; such leave to be granted by the court or a judge upon a rule to show cause or a summons, to be served according to the present practice, or in such other manner as such court or judge may direct, and which rule or summons may be in the form contained in the Schedule (A.) to this Act annexed, marked No. 7, or to the like effect.

Proceedings upon application for suggestion to revive judgment.

130. Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the court or judge shall allow such suggestion as aforesaid to be entered in the form contained in the Schedule (A.) to this Act annexed, marked No. 8, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same; and in case it does not manifestly so appear, the court or judge shall discharge the rule or dismiss the summons with or without costs: provided nevertheless, that in such last-mentioned case the party making such application shall be at liberty to proceed by writ of revivor or action upon the judgment.

Writ of revivor, and proceedings thereon.

131. The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing; and, after reciting the reason why such writ has become necessary, it shall call upon the party to whom it is directed, to appear, within eight days after service thereof, in the court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is di-

rected, and it shall give notice that, in default of appearance, the party issuing such writ may proceed to execution; and such writ may be in the form contained in the Schedule (A.) to this Act annexed, marked No. 9, or to the like effect, and may be served in any county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons; and the venue in a declaration upon such writ may be laid in any county; and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action.

Writs of *scire facias* in other cases to be tested, directed, and proceeded upon in like manner.

132. All writs of *scire facias* issued out of any of the superior courts of law at Westminster against bail on a recognizance; *ad audiendum errores*; against members of a joint-stock company or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; by or against a husband to have execution of a judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum, pursuant to the statute passed in the session holden in the eighth and ninth years of the reign of King William the Third, intituled "An Act for the better preventing frivolous and vexatious Suits;" or for recovery of land taken under an *elegit*, shall be tested, directed, and proceeded upon, in like manner as writs of revivor.

Appearance to writ of revivor.

133. Notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance to a writ of revivor.

As to issue of writ of revivor upon judgment more than ten years old.

134. A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order; if more than ten years old, not without a rule of court or a judge's order; nor, if more than fifteen, without a rule to show cause.

And with respect to the effect of death, marriage, and bankruptcy upon the proceedings in an action, be it enacted as follows:

Death, Marriage, and Bankruptcy.

Action not to abate by death.

135. The death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned. (See *ante*, p. 546.)

Proceedings in case of death of one or more of several plaintiffs or defendants.

136. If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants. (See *ante*, p. 11.)

Proceeding in case of sole plaintiff.

137. In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and, if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff. (See *ante*, pp. 13, 16.)

Proceeding upon death of sole or sole surviving defendant.

138. In case of the death of a sole defendant or sole surviving defendant, where the action survives, the plaintiff may make a suggestion, either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue, if it has so arrived, of the

death, and that a person named therein is the executor or administrator of the deceased; and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice, signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days after service of the notice, inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator; and the same proceedings may be had and taken in case of non-appearance after such notice, as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion; and in case the defendant shall have pleaded before the death, the new defendant shall be at liberty to plead to the suggestion, only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless, by leave of the court or a judge, he should be permitted to plead fresh matter in answer to the declaration; and in case the defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new defendant, besides pleading to the suggestion, shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and in case the plaintiff shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator. (See *ante*, pp. 14, 16.)

139. [Death between verdict and judgment.]

140. [Proceedings in case of death after interlocutory, and before final judgment.]

Marriage not to abate action.

141. The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment; and such judgment may be executed against the wife alone, or, by suggestion or writ of revivor pursuant to this Act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court. (See *ante*, pp. 148, 408, 510.)

Bankruptcy and insolvency of plaintiff, when not to abate action.

142. The bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give

such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy. (See *ante*, pp. 439, 519.)

Arrest of Judgment and Judgment non obstante Veredicto.

And with respect to the proceedings upon motions to arrest the judgment, and for judgment *non obstante veredicto*, be it enacted as follows:

Upon motion in arrest of judgment, pursuant to 1 Will. IV. c. 7, or for judgment *non obstante veredicto*, omitted facts may by leave of the court be suggested

143. Upon any motion made in arrest of judgment, or to enter an arrest of judgment, pursuant to the statute passed in the first year of his late Majesty King William the Fourth, intituled, "An Act for the more speedy Judgment and Execution in Actions brought in his Majesty's Courts of Law at Westminster, and in the Court of Common Pleas of the County Palatine of Lancaster, and for amending the Law as to Judgment on a *Cognovit actionem* in cases of Bankruptcy," or for judgment *non obstante veredicto* by reason of the non-averment of some alleged material fact or facts or material allegation, or other cause, the party, whose pleading is alleged or adjudged to be therein defective, may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, or such further time as the court or a judge may allow; and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action. (See *ante*, p. 691.)

Judgment to follow result of suggestion.

144. If the fact or facts suggested be admitted, or found to be true, the party suggesting shall be entitled to such judgment as he would have been entitled to if such fact or facts or allegations had been originally stated in such pleading, and proved or admitted on the trial, together with the costs of, and occasioned by, the suggestion and proceedings thereon; but if such fact or facts be found untrue, the opposite party shall be entitled to his costs of, and occasioned by, the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled. (See *ante*, p. 691.)

Costs of abortive issues.

145. Upon an arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact, arising out of the pleading for defect of which such judgment is given, upon which such party shall have succeeded; and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any. (See *ante*, p. 691.)

Error.

And with respect to proceedings in error, be it enacted as follows:

146–167. [Sections 146 to 147 inclusive relate to error.]

Ejectment.

And with respect to the action of ejectment, be it enacted as follows:

168–221. [Sections 168 to 221 inclusive relate to the action of ejectment.]

Amendment.

And whereas the power of amendment now vested in the courts and the judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form, be it enacted as follows:

Amendment.

222. It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil

causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made. (See *ante*, pp. 147, 404, 529.)

Power to Judge to make Rules and frame Writs and Proceedings.

And in order to enable the courts and judges to carry this Act thoroughly into effect, and to enable them from time to time to make rules and regulations and to frame writs and proceedings for that purpose, be it enacted as follows:

223. [General rules may be made by the judges.]

224. [New forms of writs and other proceedings.]

225. [Rules may be made by each court for government of its officers.]

Effect of Injunction.

And whereas it is expedient that injunctions and orders to stay proceedings should be rendered more effectual, be it enacted as follows:

Injunctions and orders to stay proceedings to have a specific effect.

226. In case any action, suit, or proceeding in any court of law or equity shall be commenced, sued, or prosecuted, in disobedience of and contrary to any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster, or of any judge thereof, in any other court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other court or judge thereof of such writ of injunction, rule, or order, the said other court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: provided always, that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commencing, suing, or prosecuting any such action, suit, or proceeding contrary to any injunction, rule, or order of either of the courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the courts aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding. (See *ante*, p. 489.)

And be it enacted as follows:

Interpretation of terms

227. In the construction of this Act the word "court" shall be understood to mean any one of the superior courts of common law at Westminster in which any action is brought; and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any personal action brought by writ of summons in any of the said courts; and no part of the united kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be "beyond the seas" within the meaning of this Act: and wherever in this Act, in describing or referring to any person or party, matter or thing, any word

importing the singular number or masculine gender is used, the same shall be understood to include and shall be applicable to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

228. [Her Majesty may direct all or part of this Act to extend to any court of record.]

229. [Certain of the provisions of this Act to extend and apply to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham.]

230. [Powers given by this Act to the judges of the superior courts at Westminster to make rules, etc., may be exercised by judges of the Court of Common Pleas at Lancaster and Court of Pleas at Durham as to those courts.]

231. [Judges may make rules for applying other provisions of this Act to Court of Common Pleas at Lancaster and Court of Pleas at Durham.]

232. [Provisions to apply to masters of courts at Westminster to apply to prothonotaries of Court of Common Pleas at Lancaster and Court of Pleas at Durham, and their deputies, etc.]

233. [As to proceedings in error.]

234. [Certain provisions of 4 & 5 Will. IV. c. 62, and 2 & 3 Vict. c. 16, repealed.]

Short title of Act.

235. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1852."

236. [Act not to extend to Ireland or Scotland.]

SCHEDULE (B.).

FORMS OF PLEADINGS.

Statements of Causes of Action.

On Contracts.

Goods sold.

1. Money payable by the defendant to the plaintiff for [*these words* "money payable," *etc., should precede money counts like* 1 *to* 14, *but need only be inserted in the first*] goods bargained and sold by the plaintiff to the defendant. (See *ante*, pp. 30, 32, 45, 207.)

Work and materials.

2. Work done and materials provided by the plaintiff for the defendant at his request. (See *ante*, pp. 32, 235.)

Money lent.

3. Money lent by the plaintiff to the defendant. (See *ante*, p. 34.)

Money paid.

4. Money paid by the plaintiff for the defendant at his request. (See *ante*, p. 34.)

Money received.

5. Money received by the defendant for the use of the plaintiff. (See *ante*, p. 36.)

Account stated.

6. Money found to be due from the defendant to the plaintiff on accounts stated between them. (See *ante*, p. 44.)

For an estate sold.

7. A messuage and lands sold and conveyed by the plaintiff to the defendant. (See *ante*, p. 214.)

8. The goodwill of a business of the plaintiff, sold and given up by the plaintiff to the defendant. (See *ante*, p. 228.) For goodwill.

9. The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff. (See *ante*, p. 169.) For the use of a house and land.

10. The defendant's use, by the plaintiff's permission, of a fishery of the plaintiff. (See *ante*, p. 170.) For the use of a fishery.

11. Fines payable by the defendant as tenant of customary tenements of the manor of to the plaintiff as lord of the said manor, for the admission of the defendant into the said customary tenements. (See *ante*, p. 126.) For copyhold fines.

12. The hire of [*as the case may be*], by the plaintiff let to hire to the defendant. (See *ante*, p. 145.) For hire of goods, etc.

13. Freight for the conveyance by the plaintiff for the defendant at his request of goods in ships. (See *ante*, p. 109.) For freight.

14. The demurrage of a ship of the plaintiff kept on demurrage by the defendant. (See *ante*, p. 110.) For demurrage.

15. That the defendant, on the day of , A.D. , by his promissory amount, now overdue, promised to pay to the plaintiff £ [*two*] months after date, but did not pay the same. (See *ante*, p. 91.) Payee against maker of note.

16. That one A., on, *etc.* [*date*], by his promissory note, now overdue, promised to pay to the defendant, or order, £ [*two*] months after date; and the defendant indorsed the same to the plaintiff; and the said note was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same. (See *ante*, p. 93.) Indorsee against indorser of note.

17. That the plaintiff, on, *etc.* [*date*], by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff £ [*two*] months after date; and the defendant accepted the said bill, but did not pay the same. (See *ante*, p. 76.) Drawee against acceptor of bill.

18. That the defendant, on, *etc.* [*date*], by his bill of exchange, directed to A., required A. to pay to the plaintiff £ [*two*] months after date; and the said bill was duly presented for acceptance, and was dishonoured, of which the defendant had due notice, but did not pay the same. (See *ante*, pp. 79, 80.) Payee against drawer.

19. That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff. (See *ante*, p. 190.) Breach of promise of marriage.

20. That the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day, yet the defendant neglected and refused to marry the plaintiff. (See *ante*, p. 191.)

21. That the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride. (See *ante*, pp. 230, 231.) Warranty of a horse.

22. That the plaintiff and the defendant agreed, by charter-party, that the plaintiff's ship called the 'Ariel' should with all convenient speed sail to R., or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandise, which she should carry to H., and there deliver, on payment of freight, £ per ton, and that the defendant should be allowed ten days for loading, and ten for discharge, and ten days for demurrage, if required, at £ per day; and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on For not loading pursuant to charter-party.

board the said ship at R., and that the time for so doing has elapsed, yet the defendant made default in loading the agreed cargo. (See *ante*, p. 117.)

Upon a lease for rent.

23. That the plaintiff let to the defendant a house, No. 401, Piccadilly, for seven years, to hold from the day of , A.D. , at £ a year, payable quarterly, of which rent quarters are due and unpaid. (See *ante*, p. 171.)

Upon a covenant to repair.

24. That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the day of , A.D. , and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*], yet the said house was during the said term out of good and substantial repair. (See *ante*, p. 173.)

For Wrongs independent of Contract.

Trespass to land.

25. That the defendant broke and entered certain land of the plaintiff, called the Big Field, and depastured the same with cattle. (See *ante*, p. 358.)

Assault, battery, and false imprisonment.

26. That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office. (See *ante*, p. 354.)

Criminal conversation

27. That the defendant debauched and carnally knew the plaintiff's wife. (See *ante*, pp. 295, 594, 633.)

Wrongful conversion of goods.

28. That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods; that is to say, iron, hops, household furniture [*or as the case may be*]. (See *ante*, pp. 253, 255.)

Wrongful detention of property, etc.

29. That the defendant detained from the plaintiff his title deeds of land called Belmont in the county of ; that is to say, [*describe the deeds*]. (See *ante*, p. 271.)

Diverting water from a mill.

30. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill. (See *ante*, p. 368.)

Infringement of a patent.

31. That the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of "certain improvements in the manufacture of sulphuric acid," and thereupon her Majesty Queen Victoria, by letters patent under the great seal of England, granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the day of , A.D. , subject to a condition that the plaintiff should within six calendar months next after the date of the said letters patent cause to be enrolled in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the plaintiff did within the time prescribed fulfil the said condition, and the defendant during the said term did infringe the said patent right. (See *ante*, p. 330.)

Defamation of character.

32. That the defendant falsely and maliciously spoke and published of the plaintiff the words following; that is to say, "he is a thief;"

[*if there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance,*]

whereby the plaintiff lost his situation as gamekeeper in the employ of A. (See *ante*, pp. 264, 267.)

33. That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called " " the words following; that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious. (See *ante*, pp. 262, 264.)

COMMENCEMENT OF PLEA.

34. The defendant by his attorney [*or* "in person"] says [*here state the substance of the plea*]. (See *ante*, p. 373.)

35. And for a second plea the defendant says [*here state the second plea*]. (See *ante*, p. 378.)

Pleas in Actions on Contracts.

36. That he never was indebted as alleged. Denial of debt.

[*This plea is applicable to declarations like those numbered* 1 *to* 14.] (See *ante*, p. 397.)

37. That he did not promise as alleged. Denial of contract.

[*This plea is applicable to other declarations on simple contracts, not on bills and notes, such as those numbered* 19 *to* 22. *It would be unobjectionable to use* "did not warrant," "did not agree," *or any other appropriate denial.*] (See *ante*, p. 401.)

38. That the alleged deed is not his deed. (See *ante*, p. 403.) Denial of deed.

39. That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit. (See *ante*, p. 545.) Statute of Limitations.

40. That before action he satisfied and discharged the plaintiff's claim by payment. (See *ante*, p. 559.) Payment.

41. That the plaintiff at the commencement of this suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim, for [*here state the cause of set-off, as in a declaration; see forms, ante*], which amount the defendant is willing to set off against the plaintiff's claim. (See *ante*, p. 573.) Set-off.

42. That *after the alleged claim accrued, and before this suit*, the plaintiff by deed released the defendant therefrom. (See *ante*, p. 566.) Release.

Pleas in Actions for Wrongs independent of Contract.

43. That he is not guilty. (See *ante*, p. 589.) Not guilty.

44. That he did what is complained of by the plaintiff's leave. (See *ante*, p. 624.) Leave and licence.

45. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence. (See *ante*, pp. 636, 667.) Self-defence.

46. That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof for twenty years before this suit enjoyed as of right and without interruption a way on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more Right of way.

convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of the said way. (See *ante*, p. 683.)

Right of common.

47. That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed as of right and without interruption, common of pasture over the said land of the plaintiff for all their cattle, levant and couchant, upon the said land of the defendant, at all times of the year, as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common. (See *ante*, p. 602.)

Replications.

Joinder of issue.

48. The plaintiff takes issue upon the defendant's 1st, 2nd, etc., pleas. (See *ante*, p. 390.)

Replication to pleas containing new matter.

49. The plaintiff as to the second plea says [*here state the answer to the plea as in the following forms*]. (See *ante*, p. 391.)

To plea of release.

50. That the alleged release is not the plaintiff's deed. (See *ante*, p. 567.)

51. That the alleged release was procured by the fraud of the defendant. (See *ante*, p. 567.)

To plea of set-off.

52. That the alleged set-off did not accrue within six years before this suit. (See *ante*, p. 583.)

To self-defence.

53. That the plaintiff was possessed of land whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do; and thereupon the plaintiff gently laid his hands on the defendant in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff. (See *ante*, p. 667.)

To right of way.

54. That the occupiers of the said land did not for twenty years before this suit enjoy as of right and without interruption the alleged way. (See *ante*, pp. 605, 687.)

New Assignment.

To the pleas of right of way and right of common.

55. The plaintiff, as to the and pleas, says, that he sues not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land and on other occasions, and for other purposes than those referred to in the said plea. (See *ante*, p. 638.)

[*If the plaintiff replies and new assigns, the new assignment may be as follows:*]

56. And the plaintiff, as to the and pleas, further says, that he sues not only for the trespasses in those pleas admitted, but also for, *etc.* (See *ante*, p. 393.)

[*If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows:*]

57. And the plaintiff, as to the and pleas, further says, that he sues not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses in the pleas [*the pleas replied to*] admitted, and also for, *etc.* (See *ante*, p. 393.)

THE COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. CAP. 125.)

An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.
[12th August, 1854.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. [Judge may, by consent, try questions of fact.]

2. [Two judges may sit at same time for trial of causes pending in the same court.]

3–17. [Sections 3 to 17 inclusive relate to arbitration.]

18–31. [Sections 18 to 31 inclusive relate to proceedings at the trial and evidence.]

32. [Error may be brought on a special case.]

33. [Grounds to be stated in rule nisi for new trial.]

34–42. [Sections 34 to 42 inclusive relate to appeal upon refusal of rule nisi.]

43. [Error upon award of trial *de novo*.]

44. [Payment of costs upon new trial on matter of fact.]

45. [Affidavits on new matter.]

46–49. [Sections 46 to 49 inclusive relate to oral examination of witnesses.]

50. [Discovery of documents.]

51–57. [Sections 51 to 57 inclusive relate to examination of party, orally and by written interrogatories.]

58. [Inspection by jury of parties or witnesses.]

59. [Rule or order for summoning jury.]

Examination of judgment debtor as to debts due to him.

60. It shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this Act.

Judge may order an attachment of debts.

61. It shall be lawful for a judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so

much thereof as may be sufficient to satisfy the judgment debt. (See *ante*, p. 428.)

Order for attachment to bind debts.

62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands. (See *ante*, p. 428.)

Proceedings to levy amount due from garnishee to judgment debtor.

63. If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt. (See *ante*, p. 428.)

Judge may allow judgment creditor to sue garnishee.

64. If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under "The Common Law Procedure Act, 1852." (See *ante*, pp. 27, 66, 428.)

Garnishee discharged.

65. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed. (See *ante*, p. 428.)

66. [Attachment book to be kept by the masters of each court.]

67. [Costs of application.]

Action for mandamus to enforce the performance of duties.

68. The plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested. (See *ante*, pp. 309, 631.)

Declaration in action for mandamus.

69. The declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected. (See *ante*, p. 309.)

Proceedings upon claim for mandamus.

70. The pleadings and other proceedings in any action in which a writ of mandamus is claimed, shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages. (See *ante*, p. 309.)

Judgment and execution.

71. In case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced. (See *ante*, p. 309.)

Form of peremptory writ.

72. The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.

Effect of writ of mandamus and proceedings to enforce it.

73. The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment. (See *ante*, p. 309.)

The court may order the act to be done at the expense of the defendant.

74. The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

Prerogative writ of mandamus preserved.

75. Nothing herein contained shall take away the jurisdiction of the Court of Queen's Bench to grant writs of mandamus; nor shall any writ of mandamus issued out of that court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this Act.

Proceedings for prerogative writ of mandamus accelerated.

76. Upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in all cases be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it, by the court or a judge, either with or without terms.

Proceedings on prerogative writ of mandamus.

77. The provisions of "The Common Law Procedure Act, 1852," and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Court of Queen's Bench.

Specific delivery of chattels.

78. The court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action. (See *ante*, pp. 272, 645.)

Claim of writ of injunction

79. In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract, or other in-

jury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress. (See *ante*, p. 296.)

Form of writ of summons and indorsement thereon.

80. The writ of summons in such action shall be in the same form as the writ of summons in any personal action, but on every such writ and copy thereof there shall be indorsed a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

Form of proceedings and of judgment.

81. The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge. (See *ante*, p. 297.)

Writ of injunction may be applied for at any stage of the cause.

82. It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just; and in case of disobedience such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order.

Equitable defence may be pleaded.

83. It shall be lawful for the defendant or plaintiff in replevin in any cause in any of the superior courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect. (See *ante*, pp. 376, 485.)

Equitable defence after judgment.

84. Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audità querelâ*. (See *ante*, p. 485.)

Equitable replication.

85. The plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words "for replication on equitable grounds," or words to the like effect. (See *ante*, pp. 393, 485.)

Court or judge may strike out equitable plea or replication.

86. Provided always, that in case it shall appear to the court or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out on such terms as to costs and otherwise as to such court or judge may seem reasonable. (See *ante*, p. 485.)

87. In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument. (See *ante*, p. 458.) Actions on lost instruments.

88. [Jurisdiction under Shipowners Act.]

89. [False evidence.]

90. [Execution to fix bail.]

91. Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by "The Common Law Procedure Act, 1852," as to writs of revivor. (See *ante*, p. 494.) Scire facias on judgment of assets *in futuro*.

92. Where an action would, but for the provisions of "The Common Law Procedure Act, 1852," have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that Act, the defendant or person against whom the action may be so continued may apply by summons to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act within such time as the judge shall order; and in default of such proceeding the defendant, or other person against whom the action may be so continued as aforesaid, shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied of the goods of the testator or intestate. To compel continuance or abandonment of action in case of death.

93. [Claimant in second ejectment for same premises against same defendant may be ordered to give security for costs.]

94. [As to writs of execution issued before 24th October, 1852.]

95. [Courts may appoint sittings.]

96. It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for. Amendments.

97. [General rules may be made by the judges.]

98. [New forms of writs and other proceedings.]

99. In the construction of this Act the word "court" shall be understood to mean any one of the superior courts of common law at *Westminster*; and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any personal action in any of the said courts. Interpretation of terms

100. [Provisions relating to superior courts to apply to Court of Common Pleas at Lancaster and Court of Pleas at Durham.]

101. [Provisions as to Masters of superior courts to apply to Prothonotaries of Palatinate Courts.]

102. [Court of Queen's Bench to be the Court of Appeal from Palatinate Courts.]

103. [Enactments in ss. 19 to 32 to apply to every civil court of judicature in England and Ireland.]

Commencement of Act. 104. The provisions of this Act shall come into operation on the twenty-fourth day of October, in the year of our Lord One thousand eight hundred and fifty-four.

105. [Her Majesty may direct all or part of this Act to extend to any Court of Record.]

Short title of Act. 106. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1854."

107. [Act not to extend to Ireland or Scotland.]

THE COMMON LAW PROCEDURE ACT, 1860.

(23 & 24 VICT. CAP. 125.)

An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster. [28th August, 1860.]

WHEREAS it is desirable further to improve the process, practice, and mode of pleading in, and, in some respects, to enlarge the jurisdiction of the Superior Courts of Common Law: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1–3. [Sections 1 to 3 inclusive relate to Relief against Forfeiture.]

4–11. [Sections 4 to 11 inclusive relate to Appeal from order of judge under this Act.]

12–18. [Sections 12 to 18 inclusive relate to Interpleader Proceedings.]

Procedure and Practice.

Joinder as plaintiffs of all persons supposed to be legally entitled. 19. The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: Provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge. (See *ante*, pp. 4, 103, 199, 405, 599.)

Defendant to have benefit of set-off though some plaintiffs improperly joined. 20. Upon the trial of such cause a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs

who establish their right to maintain the cause is or are indebted to him. (See *ante*, p. 574.)

No other action for same claim to be brought.

21. No other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

Provisions of 19 & 20 Vict. c. 108, as to replevin, extended to all cases of replevin.

22. The provisions of an Act passed in the session of parliament held in the nineteenth and twentieth years of the reign of her present Majesty, chapter one hundred and eight, which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to the cases of replevin of goods distrained for rent or damage feasant. (See *ante*, pp. 205, 338.)

Payment into court in replevin.

23. The plaintiff in replevin may in answer to an avowry pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise as upon a payment into court by a defendant in other actions. (See *ante*, pp. 205, 646, 654, 660.)

Effect of such payment.

24. Such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond. (See *ante*, pp. 205, 654.)

Payment into court in action on money, bonds, and for detainer.

25. In any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of "The Common Law Procedure Act, 1852;" and the like proceedings may be had and taken thereupon as to costs and otherwise. (See *ante*, pp. 272, 468, 616, 646.)

Dower, writ of right of dower, and quare impedit abolished as real actions, and to be commenced by writ of summons.

26. No writ of right of dower or writ of dower *unde nihil habet*, and no plaint for free bench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this Act in any court whatsoever; but where any such writ, action or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the court of Common Pleas in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for free bench, or in *quare impedit*, as the case may be.

Writ, and all proceedings thereupon, to be same as in ordinary actions.

27. The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of "The Common Law Procedure Act, 1852," and of "The Common Law Procedure Act, 1854," shall apply to the writ and pleadings, and proceedings thereupon.

Judge may refuse to interfere in proceedings to attach debts.

28. In proceedings to obtain an attachment of debts under "The Common Law Procedure Act, 1854," the judge may, in his discretion, refuse to interfere, where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

Proceedings where third person has a lien on the debt.

29. Whenever in proceedings to obtain an attachment of debts under the Act above mentioned it is suggested by the garnishee that the debt sought to be attached belongs to some third person

who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt.

Judge may bar claim of third person, and make orders.

30. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of "The Common Law Procedure Act, 1854," and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases with respect to the lien or charge (if any) of such third person, and to costs, as he shall think just and reasonable.

Provisions of 17 & 18 Vict. c. 125, to apply to orders.

31. The provisions of "The Common Law Procedure Act, 1854," so far as they are applicable, shall apply to any order, and the proceedings thereon, made and taken in pursuance of the herein next before mentioned powers under this Act.

Costs of writs of mandamus and injunction may be included in writs.

32. In all cases in which a writ of mandamus or of injunction is issued under the provisions of "The Common Law Procedure Act, 1854," such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable. (See *ante*, pp. 297, 309.)

Mode of enforcing writs of injunction against corporations.

33. Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a mandamus, or by writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery. (See *ante*, pp. 297, 309.)

Costs not recoverable in action for injury, and verdict less than £5, if judge certifies.

34. When the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.

35. [Enactment in lieu of s. 88, of 17 & 18 Vict. c. 125.]

Amendments.

36. It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

37. [General rules may be made by the judges.]

38. [New forms of writs and other proceedings.]

39. In the construction of this Act the word "court" shall be understood to mean any one of the superior courts of common law at *Westminster*; and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "Master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any action in any of the said courts. Interpretation of terms.

40. [Provisions relating to superior courts to apply to Court of Common Pleas at Lancaster and Court of Pleas at Durham.]

41. [Provisions as to masters of courts at Westminster to apply to prothonotaries of palatinate courts.]

42. [As to proceedings in appeal.]

43. The provisions of this Act shall come into operation on the tenth day of *October* in the year of our Lord One thousand eight hundred and sixty. Commencement of Act.

44. [Her Majesty may direct all or part of this Act to extend to any court of record.]

45. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1860." Short title.

46. Nothing in this Act shall extend to Ireland or Scotland. Extent of Act.

GENERAL RULES AS TO PRACTICE, OF HILARY TERM, 1853.

WHEREAS the practice of the Courts of Queen's Bench, Common Pleas, and Exchequer, in civil actions, in respect of which the said courts possess a common jurisdiction, has been to a great extent superseded or altered by the Common Law Procedure Act, 1852, and it is expedient that the written rules of practice of the said courts should be consolidated and rendered uniform: it is ordered, that all existing written rules of practice in any of the said courts in regard to such civil actions, save and except as regards any step or proceeding heretofore taken, shall be and the same are hereby annulled, and that the practice to be observed in the said courts with respect to the matters hereafter mentioned shall be as follows; that is to say:—

Joinder of Parties.

6. Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a non-joinder by virtue of the Common Law Procedure Act, 1852, s. 36, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the court or a judge. (See *ante*, p. 405.)

Pleadings.

7. No side bar rule for time to declare shall be granted, (See *ante*, p. 1.)

8. The defendant shall not be at liberty to waive his plea, or

enter a *relictâ verificatione* after a demurrer, without leave of the court or a judge, unless by consent of the plaintiff or his attorney. (See *ante*, pp. 556, 558.)

9. In case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, etc., shall have the same number of days for that purpose after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October. (See *ante*, p. 374.)

10. Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea. (See *ante*, pp. 531, 532.)

Payment of Money into Court.

11. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the Master.

12. When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for Plea," but not before. (See *ante*, p. 562.)

13. Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court.

Demurrer.

14. The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer, otherwise judgment. (See *ante*, pp. 693, 694.)

15. No motion or rule for a *concilium* shall be required, but demurrers as well as all special cases, special verdicts, and appeals from County Courts, shall be set down for argument in the special paper at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party. (See *ante*, p. 693.)

16. Four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer book, special case, special verdict, or appeal cases, with the points intended to

be insisted on, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Chief Baron, as the case may be, and the senior puisne judge of the court in which the action is brought; and the defendant shall deliver copies to the two other judges of the court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies. If the statements of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered, or on separate papers. (See *ante*, p. 693.)

17. When there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied, the Master shall not allow the costs thereof, on taxation, either as between party and party, or as between attorney and client. (See *ante*, pp. 385, 693.)

Venue, Change of.

18. No venue shall be changed without a special order of the court or a judge, unless by consent of the parties. (See *ante*, p. 3.)

Particulars of Demand or Set-off.

19. With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the Common Law Procedure Act, 1852), delivered or filed, containing causes of action such as those set forth in Schedule (B.) of that Act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered, that if any such declaration shall be delivered or filed, or any plea of set-off delivered, without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand, and set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer. (See *ante*, pp. 46, 576.)

20. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

21. A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order. (See *ante*, p. 374.)

Security for Costs.

22. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined.

Discontinuance.

23. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation defendant shall be at liberty to sign judgment of *non pros.*

Staying Proceedings.

24. In any action against an acceptor of a bill of exchange or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only. (See *ante*, p. 461.)

Costs; Setting-off Damages or Costs.

62. When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party. (See *ante*, p. 692.)

Miscellaneous.

174. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. (See *ante*, p. 374.)

175. The days between Thursday next before, and the Wednesday next after Easter Day, and Christmas Day, and the three following days, shall not be reckoned or included in any rules, notices, or other proceedings, except notices of trial or notices of inquiry. (See *ante*, p. 374.)

176. In all cases in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereupon, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

GENERAL RULES AS TO PLEADING, OF TRINITY TERM, 1853 (*a*).

WHEREAS, pursuant to the provisions of the statute passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice," the Judges of the Superior Courts of Common Law at Westminster made certain rules, orders, and regulations as to the mode of pleading and other matters in the said Act mentioned, which said rules, orders, and regulations were duly laid before both Houses of Parliament, as required by that statute, and came into effect and operation respectively on the first day of Easter Term, in the year of our Lord One thousand eight hundred and thirty-four, and the first day of Michaelmas term, in the year of our Lord One thousand eight hundred and thirty-eight:

And whereas it is provided by the "Common Law Procedure Act, 1852," that it should be lawful for the Judges of the Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, from time to time to make all such general rules and orders for the effectual execution of that Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, and for apportioning the costs of issues, and for other purposes mentioned in the said Act, as in their judgment should be necessary or proper; and to exercise all the powers and authority given to them by an Act of Parliament passed in the session of Parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to enable the Judges of the Courts of Common Law at Westminster to alter the Forms of Pleading," with respect to any matter therein contained relative to practice or pleading; and the provisions of the said last-mentioned Act, as to the rules, orders, or regulations made in pursuance thereof, should be held applicable to any rules, orders, or regulations which should be made in pursuance of the said Common Law Procedure Act, One thousand eight hundred and fifty-two:

And whereas by the said Act passed in the session of Parliament held in the thirteenth and fourteenth years of the reign of her present Majesty powers were given to the Judges of the Courts of Common Law at Westminster, by rules and orders, to make alterations in the forms of pleading in the said Courts, and respecting other matters in that Act mentioned; and it was enacted that all such rules, orders, or regulations should be laid before both Houses of Parliament in manner directed by the said Act, and that no such rule, order, or regulation should have effect until three months after the same should have been so laid before both Houses of Parliament; and that any rule, order, or regula-

(*a*) These rules were dated of Hilary Term, 1853, but were ordered to be in force from and after the first day of Trinity Term then next; they are therefore sometimes cited as the rules of Trinity Term, 1853 (r. T. T. 1853), and are thus distinguished from the practice rules of Hilary Term, 1853 (cited as r. H. T. 1853).

tion so made should from and after such time aforesaid be binding and obligatory on the said Courts, and all other Courts of Common Law, and on all Courts of Error, and be of like force and effect as if the provisions contained therein had been expressly enacted by Parliament:

And whereas it is expedient, for the effectual execution of the said "Common Law Procedure Act, 1852," that the said rules, orders, and regulations, respectively made in pursuance of the said statute passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth, should be repealed, and that other rules, orders, and regulations should be framed in lieu thereof:

It is therefore ordered, that from and after the first day of Trinity Term next inclusive, unless Parliament shall in the meantime otherwise enact, the said rules, orders, and regulations made respectively in pursuance of the said statute passed in the session of Parliament held in the third and fourth years of the reign of his late Majesty King William the Fourth shall be and are hereby repealed, excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters to which they relate, had or taken previous to the said first day of Trinity Term next; and the following rules, orders, and regulations shall be in force; that is to say:—

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms, as to costs or otherwise, as such court or judge may think fit. (See *ante*, p. 6.)

2. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed; provided, that on an application to the court or a judge to strike out any count, or on an objection taken before the judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances on the ground of such counts or other pleadings being in violation of this rule, the court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the court or judge may think fit. (See *ante*, pp. 6, 379.)

3. When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence as well as those of the pleading. (See *ante*, pp. 6, 379.)

4. The name of a county shall in all cases be stated in the mar-

gin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided that, in cases where local description is now required, such local description shall be given. (See *ante*, pp. 1, 359.)

5. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied. (See *ante*, pp. 5, 426, 493.)

6. In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

Exempli gratiâ. In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. (See *ante*, pp. 521, 587.)

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. (See *ante*, pp. 401, 469.)

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises; *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. (See *ante*, p. 398.)

7. In all actions upon bills of exchange and promissory notes, the plea of "*non assumpsit*" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *exempli gratiâ*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note. (See *ante*, pp. 446, 449.)

8. In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, etc., bills or notes by way of accommodation, set-off, mutual credit,

unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded. (See *ante*, pp. 376, 399, 401, 484, 521, 537, 581.)

9. In actions on policies of assurance, the interest of the assured may be averred thus:—"That A., B., C., and D. [or some or one of them] were or was interested," etc. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested." (See *ante*, p. 156.)

10. In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. (See *ante*, p. 403.)

11. The plea of "*nil debet*" shall not be allowed in any action. (See *ante*, pp. 398, 536.)

12. All matters in confession and avoidance shall be pleaded specially, as above directed, in actions on simple contracts. (See *ante*, pp. 376, 403.)

13. In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off. (See *ante*, pp. 46, 559.)

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. (See *ante*, p. 559.)

15. In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea. (See *ante*, pp. 590, 591, 616.)

16. In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. (See *ante*, p. 589.)

Exempli gratiâ. In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. (See *ante*, pp. 595, 641.)

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. (See *ante*, p. 683.)

In an action for slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate in denial of

speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. (See *ante*, p. 592.)

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. (See *ante*, pp. 594, 662.)

In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received. (See *ante*, pp. 469, 589, 601.)

17. All matters in confession and avoidance shall be pleaded specially, as in actions on contract. (See *ante*, pp. 376, 590.)

18. In actions for trespass to land, the close or place in which etc. must be designated in the declaration by name or abuttals or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the court or a judge may think reasonable. (See *ante*, pp. 2, 3, 359.)

19. In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially. (See *ante*, pp. 590, 591, 675.)

20. In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein. (See *ante*, pp. 590, 591, 673.)

21. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "By Statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record. (See *ante*, pp. 598, 617.)

22. A plea containing a defence arising after the commencement of the action may be pleaded, together with pleas of defences arising before the commencement of the action; provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea. (See *ante*, pp. 381, 388, 557.)

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants. (See *ante*, pp. 381, 388, 557.)

24. Courts of error may award a repleader, or direct a trial *de novo*.

25. The cost of proceeding in error shall be taxed and allowed

as costs in the cause, and no double costs in error shall be allowed to either party.

26. On error from one of the superior courts such court shall have power to allow interest for such time as execution has been delayed by the proceedings in error, for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of court or order of a judge for that purpose.

27. In no case shall error be brought for any error in a judgment with respect to costs, but the error (if any) in that respect may be amended by the court in which such judgment may have been given, on the application of either party.

28. A person admitted to sue *in formâ pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge.

29. If a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.

30. If the plaintiff in ejectment appear at the trial, and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for his costs of suit, as in other cases.

31. No entry or continuances, by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings. (See *ante*, p. 388.)

32. All judgments, whether interlocutory or final, shall be entered of record of the day of the month or year, whether in term or vacation, when signed, and shall not have relation to any other day; provided that it shall be competent for the court or a judge to order a judgment to be entered nunc pro tunc.

GENERAL RULES.

Michaelmas Vacation, 1854.

IT IS ORDERED, That the practice to be observed in the superior Courts of Common Law at Westminster with respect to the matters hereinafter mentioned, shall be as follows; that is to say,

I. The provisions as to pleadings and practice contained in the Common Law Procedure Act, 1852, and the rules of practice of the superior courts of common law made the 11th January, 1853, and also the rules of pleading which came into operation on the first day of Trinity Term, 1853, so far as the same are or may be made applicable, shall extend and apply to all proceedings to be had or taken under the Common Law Procedure Act, 1854.

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THE END.

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